83-6653

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO._____

DONALD M. PARADIS, Petitioner,

v.

STATE OF IDAHO, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF

THE STATE OF IDAHO

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The petitioner Donald M. Paradis respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Idaho entered in this proceeding on December 19, 1983, for which rehearing was denied on February 14, 1984.

OPINION BELOW

The opinion of the Idaho Supreme Court, not

yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of the State of Idaho was entered on December 19, 1983. A timely petition for rehearing was denied on February 14, 1984, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether acquittal of a murder charge bars admission of evidence concerning that murder in the trial of the same defendant for the subsequent murder of the first victim's companion.

2. Whether the death penalty violates the sixth amendment and fourteenth amendment to the Constitution of the United States where the jury did not participate in the capital sentencing process.

STATUTORY PROVISIONS INVOLVED

Fifth amendment, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth amendment, section one, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

I.C. § 19-2515:

> (a) After a plea or verdict of guilty, where a discretion is conferred upon the court as to the extent of the punishment, the court, upon the oral or written suggestion of either party that there are circumstances which may be properly taken into view either in aggravation or mitigation of the punishment, may, in its discretion, hear the same summarily, at a specified time, and upon such notice to the adverse party as it may direct.
>
> (b) Where a person is convicted of an offense which may be punishable by death, a sentence of death

shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.

(c) In all cases in which the death penalty may be imposed, the court shall, after conviction, order a presentence investigation to be conducted according to such procedures as are prescribed by law and shall thereafter convene a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At such hearing, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Should any party present aggravating or mitigating evidence which has not previously been disclosed to the opposing party or parties, the court shall, upon request, adjourn the hearing until the party desiring to do so has had a reasonable opportunity to respond to such evidence. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing. Evidence offered at trial but not admitted may be repeated or amplified if necessary to complete the record.

(d) Upon the conclusion of the evidence and arguments in mitigation and aggravation the court shall make written findings setting forth any statutory aggravating circumstance found. Further, the court shall set forth in writing any mitigating factors considered and, if the court finds that mitigating circumstances outweigh the gravity of any

aggravating circumstance found so as to make unjust the imposition of the death penalty, the court shall detail in writing its reasons for so finding.

(e) Upon making the prescribed findings, the court shall impose sentence within the limits fixed by law.

(f) The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed:

(1) The defendant was previously convicted of another murder.

(2) At the time the murder was committed the defendant also committed another murder.

(3) The defendant knowingly created a great risk of death to many persons.

(4) The murder was committed for remuneration or the promise of remuneration or the defendant employed another to commit the murder for remuneration or the promise of remuneration.

(5) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(6) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.

(7) The murder was one defined as murder of the first degree by section 18-4003, Idaho Code, subsections (b), (c),(d),(e) or (f), and it was accompanied with the specific intent to cause the death of a human being.

(8) The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

(9) The murder was committed against a former or present peace officer, executive officer, officer of the court, judicial officer or prosecuting attorney because of the exercise of official duty.

(10) The murder was committed against a witness or potential witness in a criminal or civil legal proceeding because of such proceeding.

I.C. § 19-2827:

Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Idaho. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Idaho and to the attorney general together with a notice prepared by the clerk and a report prepared by the trial judge setting forth the findings required by section 19-2515(d), Idaho Code, and such other matters concerning the sentence imposed as may be required by the Supreme Court. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and punishment prescribed. The report may be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Idaho.

(b) The Supreme Court of Idaho shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether the evidence supports the judge's finding of a statutory

aggravating circumstance from among those enumerated in section 19-2515, Idaho Code, and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel.

(f) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration.

(g) The Supreme Court shall collect and preserve the records of all cases in which the penalty of death was imposed from and including the year 1975.

STATEMENT OF THE CASE

This is a criminal case in which petitioner, Donald M. Paradis, seeks reversal of his conviction of murder in the first degree. Petitioner further questions the imposition of a capital sentence.

Petitioner was charged with murder in the first degree by information on December 30, 1980. R. Vol. I, pp. 137-138. At the start of his trial, petitioner moved to exclude evidence concerning the murder of Scott Currier, for which he had been acquitted. Tr. Vol. 1, p. 2, L. 10-12. The court denied the motion. R. Vol. I, pp. 129-134; Tr. Vol. 1, p. 2, L. 12-17.

The basis of petitioner's motion in limine was the fifth amendment to the United States Constitution and its double jeopardy clause with its attendant collateral estoppel rule. R. Vol. I, pp. 129-134; Appendix. The trial court ruled that evidence concerning Scott Currier's death was admissible to portray a "rational and cohesive scenario" of the circumstances of the charged murder. Tr. Vol. I, p. 2, L. 10-17; Appendix. The Idaho Supreme Court affirmed the trial court's conclusion. State v. Paradis, 1983 Op. No. 190, slip op. at 7-11 (Idaho, Dec. 19, 1983).

The basic facts of the instant case were adequately expressed by the Idaho Supreme Court, as follows:

> In June of 1980, Scott Currier arrived in Spokane, Washington, with his fiancee. Sometime during that month they became acquainted with members of a Spokane motorcycle gang, including appellant, through a chance meeting in a Spokane park. Currier and the deceased, Kimberly Palmer, had known each other for five years and previously dated. On June 19, 1980, Palmer and Currier left Palmer's Spokane residence to go to Idaho on a camping trip, driving a blue and white van owned by Currier's fiancee.

The next evening, Friday, June 20, Currier and Palmer checked into a motel located around the corner from appellant's Spokane residence. After checking in, they were observed looking for something in the rear of the van. Currier then went back to the motel clerk and asked for a return of his money, indicating several guns had been stolen, he knew who did it, and he was going to retrieve them. Currier and Palmer then left the motel.

On Saturday morning, June 21, at approximately 6:30 a.m., a blue and white van was observed driving up a steep, sparsely populated mountain road south of Post Falls, Idaho. In the van were two or three men, one wearing a gray cap. Thirty minutes later, three men were observed on foot, coming down the same steep mountain road. Witnesses later identified these three men as Donald Paradis, appellant here, Thomas Gibson and Larry Evans. Within the next thirty minutes, these same three men were seen at various locations in Post Falls. One was carrying what some observers believed to be a rifle rolled up in a blanket. Post Falls police received a report of a man with a gun, and upon investigation made contact with the three men outside a drive-in restaurant. From identification cards shown to police, the three were positively identified as appellant, Gibson and Evans.

On Sunday morning, June 22, Post Falls police received a report of a one-car rollover on the aforementioned mountain road. Upon investigation, they discovered the van, overturned, with various items scattered around it. Upon closer inspection an officer discovered Kimberly Palmer's body lying face down in a creek 70 to 80 feet away from the van. Later, Scott Currier's body was found near the van stuffed into a sleeping bag tied with a small piece of terry cloth. Currier's belt was also in the bag, with a distinctive brass buckle missing, apparently cut off the belt.

Lying under Palmer was a distinctive light blue Levi cap, identified as belonging to Larry Evans. Currier had been beaten severely around the head. Palmer had been manually strangled. There was evidence at the trial suggesting that Palmer was still alive when she was placed in the stream bed.

Early Sunday morning, June 22, between 4:30 and 5:00 a.m., appellant's residence in Spokane, Washington, was severely damaged by an arson fire. An investigator, who was on the scene to determine the cause of the fire, observed a rolled-up rug, in the basement of the house, surrounded by a reddish fluid. In the rug were Currier's missing brass belt buckle, a blue colored lawn dart with traces of blood on the end, and a piece of blue terry cloth. The lawn dart closely matched puncture wounds in Currier's back. The piece of blue terry cloth matched the piece of terry cloth used to tie up the sleeping bag where Currier's body was found. Testimony placed appellant at the residence in the early morning hours before the fire began.

Appellant was arrested on Monday, June 23, at an abandoned gas station where he had been staying since the fire. Recovered from appellant's vehicle was a blue blanket previously left in the van by Currier's fiancee.

An autopsy was performed upon both victims. A major issue at trial concerned jurisdiction over the crime because, although strong physical evidence indicated that Currier was battered and probably killed at appellant's house in Washington, other evidence indicated that Palmer was most likely killed in Idaho. A major part of the autopsy dealt with the differences that existed between the two bodies. Currier's body had decomposed significantly by the time of the autopsy. Palmer's body had not decomposed. This indicated to the medical examiner that Currier had been killed some hours before Palmer. Another difference between the two bodies was that Palmer's lungs were half filled with water.

> The medical examiner hypothesized that this was because Palmer lay face down in the creek while still gasping for breath. Based on this evidence, the prosecution theorized that Palmer, a witness to Currier's murder, was still alive when the van was driven to Idaho and was killed to prevent her from identifying the persons who killed Currier.
>
> Appellant was charged in Washington with the murder of Scott Currier. After a trial, he was acquitted. He was then extradited to Idaho for trial in the murder of Kimberly Palmer.
>
> Initially, appellant filed a motion in limine to exclude evidence concerning the death of Scott Currier. The trial court denied the motion, ruling that the evidence was admissible to portray a "rational and cohesive scenario." Evidence of Currier's death was introduced in the Idaho trial over the continuing objection of appellant.

In his brief to the Idaho Supreme Court, petitioner asserted that a defendant is entitled to jury participation in the capital sentencing process. Brief of Appellant, pp. 34-41; Appendix. The Idaho Supreme Court rejected the analysis, concluding "that there is no federal constitutional requirement of jury participation in the sentencing process and that the decision to have jury participation in the sentencing process as contrasted with judicial discretion sentencing, is within the policy determination of the individual states." State v. Paradis, 1983 Op. No. 190, slip op. at 11-12 (Idaho, Dec. 19, 1983).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER STATE AND FEDERAL COURTS AS TO THE PROPER INTERPRETATION OF THE FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE AND THIS COURT'S DECISION IN ASHE V. SWENSON, 397 U.S. 436 (1970).

The issue presented herein is one of constitutional significance which requires this Court's resolution. The basic question is whether evidence of an acquitted offense may be used against a defendant in a subsequent prosecution. In the instant case, the issue reaches constitutional dimension since the prosecution's introduction of substantial evidence of the Scott Currier murder placed the petitioner in the position of having to run the gauntlet for the Currier murder a second time.

As this Court noted, when it applied the doctrine of collateral estoppel to criminal proceedings as part of the fifth amendment guarantee against double jeopardy:

> For whatever else that constitutional guarantee may embrace, North Carolina v. Pearce, 395 U.S. 711, 717, it surely protects a man who has been acquitted from having to "run the gantlet" a second time. Green v. United States, 355 U.S. 184, 190.

Ashe v. Swenson, 397 U.S. 436, 446 (1970).

Two conflicting points of view have developed under Ashe. See generally, Annot., Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense, 86 ALR2d 1132 (1962, Supp. 1983). The better view was best expressed by the Fifth Circuit Court of Appeals in Wingate v. Wainwright,

464 F.2d 209, 215 (5th Cir. 1972):

> It is fundamentally unfair and totally incongruous with our basic concept of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury . . . has concluded he did not commit. Otherwise a person could never remove himself from the blight and suspicious aura which surrounds an accusation. . . .

Cf. Note, Expanding Double Jeopardy: Collateral Estoppel and the Evidentiary Use of Prior Crimes of Which the Defendant has been Acquitted, 2 Fla. St. U. L. Rev. 511 (1974).

Similarly, the Third Circuit Court of Appeals has favored broad application of collateral estoppel in criminal cases. United States v. Keller, 624 F.2d 1154, 1160 (3d Cir. 1980). Accord United States v. Mespoulede, 597 F.2d 329 (2d Cir. 1979). In Keller, a defendant charged with conspiracy to distribute PCP had been acquitted of participating in other drug transactions after the end of the conspiracy. As the court noted:

> The Government contends that collateral estoppel is inapplicable because "[i]t is not the result of the prior case that was material, but rather the facts which were undisputed." Government Brief, page 11. Thus, the Government would have us hold that the prior conduct is admissible notwithstanding the determination by the earlier fact finder that the defendant's state of knowledge and level of participation did not satisfy the requirement of the criminal law. See United States v. Phillips, 401 F.2d at 305. We decline to so hold since that would eviscerate the effect of the prior acquittal.

624 F.2d at 1160. In the case at bar, the State made an argument quite similar to that presented in Keller.

As the Second Circuit Court of Appeals noted with respect to Wingate v. Wainwright:

> The court held that it was irrelevant that the relitigated issue was an "evidentary" fact rather than an "ultimate" fact in the new trial. As in the case before us, the relitigated facts were offered into evidence to prove that the defendant committed a different offense, but failure to prove the prior criminal acts beyond a reasonable doubt would not preclude a conviction. The essential point is that the defendant must defend against charges or factual allegations that he overcame in the earlier trial, just as if that trial had never taken place.

United States v. Mespoulede, 597 F.2d 329, 335 (2d Cir. 1979) (citation omitted, emphasis added). As the court also stated: "An acquittal in a criminal case would no longer serve to clear a man's name; rather, a permanent stigma would remain, a pall cast over his reputation." 597 F.2d at 335, fn. 9

The other view has been expressed by the Ninth Circuit Court of Appeals as follows:

> [W]e perceive no compelling reason to engraft upon this rule a limitation that would prevent the introduction of such evidence in any instance simply because of the added factor of acquittal. To the contrary, we believe that despite the acquittal the matter of admission or rejection is and should be addressed to the sound discretion of the trial judge,

> thus fostering the policy which favors the admission of evidence while at the same time protecting the defendant in instances where the trial judge errs.

United States v. Castro-Castro, 464 F.2d 336, 337 (9th Cir. 1972) citing Hernandez v. United States, 370 F.2d 171, 173-174 (9th Cir. 1966).

The conflict regarding the application of collateral estoppel in instances where evidence of an acquitted offense is presented in a subsequent prosecution would be sufficient to warrant this Court's attention. In this instance, however, principles beyond the double jeopardy clause require resolution by this Court.

In light of the general rule proscribing admission of evidence of other crimes, several jursidictions have concluded that the fact of acquittal bars introduction of the crime previously charged. The Arizona Supreme Court was among the first to reach this conclusion when it concluded that the exclusion of a former offense for which defendant was acquitted rests upon broader grounds than res judicata or collateral estoppel:

> We agree with the recognized exceptions to the general rule excluding evidence of former offenses, because that evidence is relevant, other than as proof of the character of the defendant, and because we believe that the need for and desirability of such evidence outweigh any prejudice to the defendant. . . .
>
> The fact of an acquittal, we feel, when added to the tendency of such evidence to prove the defendant's bad character and criminal propensities,

> lowers the scale to the side of inadmissibility of such evidence.

State v. Little, 87 Ariz. 295, 350 P.2d 756, 763 (1960). Accord State v. Perkins, 349 So.2d 161, 163 (Fla., 1977).

Other jurisdictions have concluded that the fact of acquittal does not impact the admissibility of the prior offense but relates to the weight of the evidence. See Jenkins v. State, 147 Ga.App. 21, 248 S.E.2d 33 (1978); Ladd v. State, 568 P.2d 960 (Alaska, 1977). Thus, even if the evidence of a prior crime is material to the crime charged, it must be excluded where its prejudicial impact substantially outweighs its probative value. People v. Corbeil, 77 Mich.App. 691, 259 N.W.2d 193, 195 (1977). Accord People v. Atkins, 96 Mich.App. 672, 293 N.W.2d 671, 675-676 (1980); People v. Milano, 59 A.D.2d 852, 399 N.Y.S.2d 226, 227 (1977); Stuart v. State, 561 S.W.2d 181, 182 (Tex.Cr.App., 1978).

Through the course of petitioner's trial for Kimberly Palmer's murder, the prosecution presented evidence of the Currier murder. Photographs of evidence, seized from defendant's house relating to Currier's murder, and of Currier's body were admitted. Tr. Vol. 2, p. 154, L. 8; Vol. 3, p. 346, L. 24; Vol. 3, p. 386, L. 20; Vol. 3, p. 387, L. 5; Vol. 3, p. 389, L. 15; Vol. 3, p. 431, L. 22; Vol. 3, p. 482, L. 13. Investigating officers described the evidence, concerning the Currier murder, which was seized from defendant's home. Tr. Vol. 1, p. 119, L. 3-16; Vol. 2, p. 143, L. 13-16; Vol. 3, p. 367, L. 11; Vol. 3, p. 369, L. 5-8. At one point, a witness referred to Scott

Currier as "the victim." Tr. Vol. 3, p. 397, L. 17-19. As the photographs attached to the Idaho Supreme Court's decision in this case show [State v. Paradis, 1983 Op. No. 190, slip. op. at 33-36 (Idaho, Dec. 19, 1983)], the prejudice to petitioner is clear.

The case at bar presents this Court with the opportunity to clarify the applicable principles--first, whether acquittal by a court of competent jurisdiction precludes presentation of the same evidence as presented in the earlier trial in a later hearing under the policy of broad application of collateral estoppel and double jeopardy principles; and second, whether acquittal impacts the admissibility, rather than the weight, of other crime evidence.

In light of the substantial conflict among the various jurisdictions, it is of vital importance that this Court resolve the question. Further, application of either constitutional collateral estoppel or the balance test of prejudice versus probative value reflects the clear error of the Idaho Supreme Court's decision in this instance.

Less prejudicial means were available to the prosecution to present its "rational and cohesive scenario" of the charged offense. It could have shown the fact of Currier's death and his relationship with Kimberly Palmer but excluded the details of the event. See People v. King, 276 Ill. 138, 114 N.E. 601 (1916).

The conflicts described herein justify the

grant of certiorari to review the judgment below.

2. THE DECISION BELOW DEMONSTRATES THE CONFLICT BETWEEN TWO OR MORE STATES CONCERNING THE APPLICATION OF THE SIXTH AMENDMENT RIGHT OF TRIAL BY JURY TO THE CAPITAL SENTENCING PROCESS.

The issue presented herein is of constitutional significance and requires this Court's consideration. Of the five states which gave the jury no formal role in the capital sentencing scheme--Arizona, Idaho, Montana, Nebraska, and Oregon--only Oregon has concluded that judicial sentencing is unconstitutional [State v. Quinn, 290 Or. 383, 623 P.2d 630 (1981)]. Ariz. Rev. Stat. Ann. § 13-703 was upheld in State v. Gretzler, 135 Ariz. 42, 659 P.2d 1 (1983) cert. denied ____U.S.____, 103 S.Ct. 2444 (1983) while Mont. Code Ann. § 46-18-301 was ruled constitutional in Fitzpatrick v. State, ____ Mont. ____, 638 P.2d 1002 (1981), after remand, ____ Mont. ____, 671 P.2d 1 (1983). Nebraska's judicial sentencing scheme has been ruled constitutional by its state supreme court as well. State v. Moore, 210 Neb. 457, 316 N.W.2d 33 (1982) cert. denied 456 U.S. 984 (1982); State v. Simants, 197 Neb. 549, 250 N.W.2d 881 (1977).

The Idaho Supreme Court, commencing with State v. Creech, ____ Idaho ____, ____ P.2d ____ (1983), has held "that there is no federal constitutional requirement of jury participation in the sentencing process and that the decision to have jury participation in the sentencing process, as contrasted with judicial discretion sentencing,

is within the policy determination of the individual states." State v. Paradis, 1983 Op. No. 190, slip op. at 12 (Idaho, Dec. 19, 1983).

The conflict among the states which permit judicial sentencing is not the sole justification for this Court's exercise of jurisdiction in this matter. The question of extending the sixth amendment right to capital sentencing is one of great importance to the several convicts awaiting administration of the death sentence in the states of Idaho, Arizona, Montana, and Nebraska. Further, the previous decisions of this Court reflect the error in reasoning of those courts which have upheld the judicial sentencing scheme.

The sixth amendment to the Constitution of the United States assures that

> [T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury, . . .

Since the trial is not terminated until the sentencing process and in light of the serious nature of capital sentencing, defendant asserts that his constitutional rights were violated when the trial judge determined sentence in this capital case.

The issue of jury participation in capital sentencing was raised but not addressed by the United States Supreme Court in Lockett v. Ohio, 438 U.S. 586 (1978). Justice Rehnquist did discuss the jury's role in his dissenting opinion, stating:

> [T]his Court "has never suggested that jury sentencing is constitutionally required." No majority of this Court has ever reached a contrary conclusion, and I would not do so today.

438 U.S. at 633.

Justice Rehnquist's position was based on the Court's earlier statement that while "jury sentencing in a capital case can perform an important societal function . . . it has never [been] suggested that jury sentencing is constitutionally required." Proffitt v. Florida, 428 U.S. 242, 252 (1976). The significance of this passage from Proffitt is reduced since the Florida procedure considered in Proffitt did not completely exclude the jury from the capital sentencing process. The jury was responsible for recommending either life imprisonment or the death penalty, although its role was only advisory. FSA § 921.141. As a result, the implication that no constitutional provision mandates jury participation in capital sentencing should be viewed as dicta. Further, Justice Rehnquist's analysis of the Proffitt language must be viewed in light of his consistent dissent from the Court's close scrutiny of death penalty legislation. See Lockett v. Ohio, supra; Woodson v. North Carolina, 428 U.S. 280, 308 (1976); Furman v. Georgia, 408 U.S. 238, 265 (1972). The fact that the vast majority of states require jury participation in capital sentencing carries some weight in the determination whether jury involvement at sentencing is constitutionally required. Gregg v. Georgia,

428 U.S. 153, 179-181 (1976); Gideon v. Wainwright, 372 U.S. 335, 345 (1963).

In 1972, this Court declared the Georgia and Texas capital punishment statutes unconstitutional in Furman v. Georgia, supra. The Court ruled that the procedures by which the defendants were selected for the death penalty were constitutionally inadequate because of the jury's unfettered discretion to impose the death penalty. Following Furman, more than two-thirds of the states reenacted some form of the death penalty. The Court's first opportunity to review these new statutes came in 1976.

In Gregg v. Georgia, supra, this Court acknowledged the role of the jury in capital sentencing. As stated:

> Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment.

428 U.S. at 173. The jury role in capital sentencing is necessary "to maintain a link between contemporary community values and the penal system--a link which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" 428 U.S. at 190 (citation omitted).

Since the eighth amendment stands to assure that the State's power to punish is "exercised within the limits of civilized standards," the jury is needed to help set those standards. Woodson v. North Carolina, 428 U.S. 180, 188 (1976). The Court in Woodson described

three indicia of societal values with respect to sentencing--history and traditional usage, legislative enactments, and jury determinations. Id. As stated at page 295:

> In Witherspoon v. Illinois, 391 U.S. 510 (1968), the Court observed that "one of the most important functions any jury can perform" in exercising its discretion to choose "between life imprisonment and capital punishment" is "to maintain a link between contemporary community values and the penal system." Id. at 519, and n. 15.

The reference to Witherspoon underscores the fundamental nature of the jury's involvement in capital punishment sentencing schemes. At issue in Witherspoon was whether a juror could be dismissed for cause after indicating on voir dire that he might be hesitant to return a death verdict. Ruling that such a process deprived the defendant of an impartial jury, this Court noted:

> And one of the most important functions any jury can perform in making such a selection [between life and death] is to maintain a link between contemporary community value and the penal system. . . .

Witherspoon v. Illinois, 391 U.S. 510, 519, n. 15, 88 S. Ct. 1770, 20 L.Ed.2d 776 (1968).

Witherspoon's emphasis on a maximum cross section of community viewpoints for the jury panel was based on the premise that the jury represents a composite of society. Witherspoon observed that less than half of the American public believed in the death penalty. 391 U.S. at 520.

As a result, a jury process which routinely excluded all those in the majority who did not favor capital punishment did not properly reflect the views of the whole community.

In Adams v. Texas, 448 U.S. 38 (1980), the Witherspoon rationale was extended to the sentencing phase of a bifurcated capital trial. The Court struck down a provision which provided that a prospective juror would be disqualified unless he stated "under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact." Tex. Penal Code Ann. § 12.31(6) (Supp. 1980). As in Witherspoon, the rationale for the decision was that the lack of a representative cross-section of the community resulting from such a procedure deprived the defendant of his right to an impartial jury. As observed, at page 49:

> Despite the hypothetical existence of the juror who believes literally in the Biblical admonition "an eye for an eye." See Witherspoon v. Illinois, supra, at 536 (Black, J., dissenting), it is undeniable, and the State does not seriously dispute, that such jurors will be few indeed as compared with those excluded because of scruples against capital punishment.

Although the above-cited decisions stop short of holding that a jury is constitutionally required at sentencing, their import is clear. A defendant in a capital case is entitled to the widest possible cross-section to determine his fate. When the sentencing is determined solely by the trial judge, the decision whether a defendant lives or dies is made by one individual instead of

twelve diverse personalities. The jury acts as "an essential continuing barometer of society's willingness to allow a death penalty statute to remain in effect." S. Kauter, Brief Against Death: More on the Constitutionality of Capital Punishment in Oregon, 17 Will. L. Rev. 629, 658-659 (1981). All of these policy considerations combine to create a strong argument under the sixth and fourteenth amendments and the eighth and fourteenth amendments that a defendant is entitled to jury participation in the capital sentencing process.

In light of the conflict among the states and the absence of a direct ruling by this Court on the issue of jury participation in capital sentencing, this Court should grant certiorari to review the judgment below. Further, the correctness of the decision below is open to serious question.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Idaho Supreme Court.

Respectfully submitted,

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APPENDIX "A"

1983 Opinion No. 190

IN THE SUPREME COURT OF THE STATE OF IDAHO
NO. 14565

STATE OF IDAHO,

Plaintiff-respondent,

v.

DONALD M. PARADIS,

Defendant-appellant.

Boise term, September 1983

Filed: December 19, 1983

Frederick C. Lyon, Clerk

Appeal from the District Court of the First Judicial District of the State of Idaho, Kootenai County, Hon. Gary M. Haman, District Judge.

Appeal from conviction for first degree murder and the sentence of death imposed upon that conviction. Affirmed.

William V. Brown, Coeur d'Alene, Idaho, for appellant.

Hon. Jim Jones, Attorney General; Lynn E. Thomas, Solicitor General; Larry K. Harvey, Chief Deputy Attorney General, Boise, Idaho, for respondent.

BAKES, J.

Appellant appeals his conviction for first degree murder and the sentence of death imposed upon that conviction. Our review is in response to his appeal, and, in addition, we review this case pursuant to our duty to automatically review capital cases. I.C. § 19-2827.

In June of 1980, Scott Currier arrived in Spokane, Washington, with his fiancee. Sometime during that month they became acquainted with members of a Spokane motorcycle gang, including appellant, through a chance meeting in a Spokane park. Currier and the deceased, Kimberly Palmer, had known each other for five years and previously dated. On June 19, 1980, Palmer and Currier left Palmer's Spokane

residence to go to Idaho on a camping trip, driving a blue and white van owned by Currier's fiancee.

The next evening, Friday, June 20, Currier and Palmer checked into a motel located around the corner from appellant's Spokane residence. After checking in, they were observed looking for something in the rear of the van. Currier then went back to the motel clerk and asked for a return of his money, indicating several guns had been stolen, he knew who did it, and he was going to retrieve them. Currier and Palmer then left the motel.

On Saturday morning, June 21, at approximately 6:30 a.m., a blue and white van was observed driving up a steep, sparsely populated mountain road south of Post Falls, Idaho. In the van were two or three men, one wearing a gray cap. Thirty minutes later, three men were observed on foot, coming down the same steep mountain road. Witnesses later identified these three men as Donald Paradis, appellant here, Thomas Gibson and Larry Evans. Within the next thirty minutes, these same three men were seen at various locations in Post Falls. One was carrying what some observers believed to be a rifle rolled up in a blanket. Post Falls police received a report of a man with a gun, and upon investigation made contact with the three men outside a drive-in restaurant. From identification cards shown to police, the three were positively identified as appellant, Gibson and Evans.

On Sunday morning, June 22, Post Falls police received a report of a one-car rollover on the aforementioned mountain road. Upon investigation, they discovered the van, overturned, with various items scattered around it. Upon closer inspection an officer discovered Kimberly Palmer's body lying face down in a creek 70 to 80 feet away from the van. Later, Scott Currier's body was found near the van stuffed into a sleeping bag tied with a small piece of terry cloth. Currier's belt was also in the bag, with a distinctive brass buckle missing, apparently cut off the belt. Lying under Palmer was a distinctive light blue Levi cap, identified as belonging to Larry Evans. Currier had been beaten severely around the head. Palmer had been

manually strangled. There was evidence at trial suggesting that Palmer was still alive when she was placed in the stream bed.

Early Sunday morning, June 22, between 4:30 and 5:00 a.m., appellant's residence in Spokane, Washington, was severely damaged by an arson fire. An investigator, who was on the scene to determine the cause of the fire, observed a rolled-up rug, in the basement of the house, surrounded by a reddish fluid. In the rug were Currier's missing brass belt buckle, a blue colored lawn dart with traces of blood on the end, and a piece of blue terry cloth. The lawn dart closely matched puncture wounds in Currier's back. The piece of blue terry cloth matched the piece of terry cloth used to tie up the sleeping bag where Currier's body was found. Testimony placed appellant at the residence in the early morning hours before the fire began.

Appellant was arrested on Monday, June 23, at an abandoned gas station where he had been staying since the fire. Recovered from appellant's vehicle was a blue blanket previously left in the van by Currier's fiancee.

An autopsy was performed upon both victims. A major issue at trial concerned jurisdiction over the crime because, although strong physical evidence indicated that Currier was battered and probably killed at appellant's house in Washington, other evidence indicated that Palmer was most likely killed in Idaho. A major part of the autopsy dealt with the differences that existed between the two bodies. Currier's body had decomposed significantly by the time of the autopsy. Palmer's body had not decomposed. This indicated to the medical examiner that Currier had been killed some hours before Palmer. Another difference between the two bodies was that Palmer's lungs were half filled with water. The medical examiner hypothesized that this was because Palmer lay face down in the creek while still gasping for breath. Based on this evidence, the prosecution theorized that Palmer, a witness to Currier's murder, was still alive when the van was driven to Idaho and was killed to prevent her from identifying the persons who killed Currier.

Appellant was charged in Washington with the murder of Scott Currier. After a trial, he was acquitted. He was then extradited to Idaho for trial in the murder of Kimberly Palmer.

Initially, appellant filed a motion in limine to exclude evidence concerning the death of Scott Currier. The trial court denied the motion, ruling that the evidence was admissible to portray a "rational and cohesive scenario." Evidence of Currier's death was introduced in the Idaho trial over the continuing objection of appellant.

I.

A.

First, appellant alleges that the trial court erred in not giving a certain instruction to the jury. Appellant alleges that under Idaho law, where a criminal case rests entirely upon circumstantial evidence, the jury must be instructed to find the defendant guilty only if the facts are entirely consistent with his guilt. See State v. Davis, 69 Idaho 270, 206 P.2d 271 (1949); State v. McLennan, 40 Idaho 286, 231 P. 718 (1925); State v. Marcoe, 33 Idaho 284, 193 P. 80 (1920).

In State v. Holder, 100 Idaho 129, 594 P.2d 639 (1979), we reversed a defendant's conviction for failure to give the following requested instruction:

> "You are not permitted to find the defendant guilty of the crime charged against him based on circumstantial evidence unless the proved circumstances are not only consistent with the theory that the defendant is guilty of the crime, but cannot be reconciled with any other rational conclusion and each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt has been proved beyond a reasonable doubt.
>
> "Also, if the evidence is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, it is your duty to adopt that interpretation which points to the defendant's innocence, and reject the other which points to his guilt." 100 Idaho at 132.

The trial judge in Holder had given an instruction which merely distinguished between circumstantial and direct evidence and did not explain the effect of a circumstantial case. Appellant here contends that the trial court erred in the same manner, in that he gave insufficient instructions on the effect of a circumstantial case. However, unlike in Holder, the trial judge here gave the following instruction at the beginning of appellant's trial:

> "To convict the defendant, the evidence must, to your minds, exclude every reasonable hypothesis other than the guilt of the defendant. If after consideration of all the evidence in the case, you may reasonably explain the facts given in evidence on any reasonable ground other than the guilt of the defendant, you must acquit."

This instruction, which was not objected to, sufficiently informed the jury that it could not convict the appellant unless all the facts were consistent with guilt, and excluded any reasonable hypothesis other than guilt. This is in effect the same type of instruction we indicated should have been given in State v. Holder, supra. It informs the jury of its duty in a case involving only circumstantial evidence. Accordingly, there was no error in failing to give any further instructions on that issue.[1]

B.

Appellant also contends that insufficient evidence was presented at trial to convict him of the crime charged. He argues that only circumstantial evidence connects him to the scene, and that to be convicted of the principal offense it must be shown that an aider and abettor possessed the same intent as the principal. Appellant argues that the proof at trial failed in this respect, and that on the evidence presented no reasonable jury could have convicted appellant.

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[1]Nor did the trial court err in giving this instruction at the beginning of the trial rather than at the end. The court reminded the jury at the beginning and end of trial that the instructions were to be considered as a whole, both those given at the beginning and those given at the end. He also indicated that all of the instructions were to be taken into the jury room in written form and considered there as a whole.

He also argues that the prosecution did not sufficiently prove beyond a reasonable doubt that the murder was committed in Kootenai County. Appellant's reliance upon these arguments is misplaced since a defendant can be convicted solely on circumstantial evidence. State v. Chapple, 98 Idaho 475, 567 P.2d 20 (1977); State v. Ponthier, 92 Idaho 704, 449 P.2d 364 (1969). The state presented a strong circumstantial case against appellant. He was placed at or near the scene where the victim's body was found, in the company of a person, Larry Evans, who was almost certainly in or around the scene at the time of the murder (as indicated by the presence of his hat under Palmer's body). The area was sparsely populated, and very few people used the road where the van was found; thus, the presence of strangers in the area was conspicuous. Witnesses observed a van Palmer and Currier had been driving on that road shortly before three men, whose identities were established, including appellant, were observed leaving the area on foot. The presence of these men on foot left little doubt that they had reached the area in the van. In addition, strong evidence of motive was presented in that appellant was strongly linked, by evidence discovered in his house, to the death of Scott Currier. Currier's distinctive brass belt buckle, cut off his belt, was found at appellant's house. The belt was found on Currier's body. A lawn dart which was used to stab Currier in the back was found in appellant's house. Pieces of terry cloth identical to those used to tie Currier into the sleeping bag were found in appellant's house. There was evidence that an attempt was made to clean the house after Currier's death, as evidenced by the bloody rug hidden in the basement, with rags having been washed in a washing machine. An arson caused fire had been set in appellant's house in an apparent attempt to destroy all of this evidence. There was a strong inference that appellant attempted to leave the area after the killings. Also, a blue blanket that had been in Currier's fiancee's van was found in appellant's car when he was arrested. The circumstantial evidence presented in this case was more than sufficient to support the con-

viction of appellant for aiding and abetting the murder of Kimberly Palmer.

C.

As previously noted, appellant was tried in Washington for the murder of Scott Currier, and acquitted. Evidence connecting appellant to Currier's death was introduced in the Palmer trial over appellant's objections. Appellant contends that the admission of this evidence was error; thus, his conviction is tainted and must be reversed.

Evidence connecting appellant to the death of Scott Currier constitutes evidence of another crime for which appellant was not on trial in the present case. Generally, evidence of other crimes of a defendant is not admissible at trial to show the defendant's criminal propensity. State v. Needs, 99 Idaho 883, 591 P.2d 130 (1979); State v. Wrenn, 99 Idaho 506, 584 P.2d 1231 (1978). Such evidence may be introduced, however, if the evidence falls within one of the generally recognized exceptions to the general rule.

> "However, this jurisdiction will admit evidence of defendant's past criminal activity to prove: (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, (5) the identity of the person charged with the commission of the crime on trial, and (6) other similar issues." State v. Needs, supra at 892-3, 591 P.2d at 139-40.

The evidence of the Currier death was presented not for the purpose of showing appellant's criminal propensity, but for the purpose of showing motive and a common scheme and especially to indicate to the jury the entire factual situation presented in this case, as stated by the trial judge, a "rational and cohesive scenario," also a use which is permissible. State v. Izatt, 96 Idaho 667, 534 P.2d 1107 (1975); State v. Dayley, 96 Idaho 527, 531 P.2d 1172 (1975); State v. Dillon, 93 Idaho 698, 471 P.2d 553 (1970), cert. denied 401 U.S. 942, 91 S.Ct. 947.

However, the situation in this case is slightly different from previous Idaho cases in that the "other crime" of which evidence is being introduced was a crime for which the appellant has been acquitted. Nevertheless, evidence of a prior acquitted crime is generally allowed if it falls within one of the recognized exceptions already noted. See, e.g., Hernandez v. United States, 370 F.2d 171 (9th Cir. 1966); Buatte v. United States, 350 F.2d 389 (9th Cir. 1965), cert. den. 382 U.S. 984; Ladd v. State, 568 P.2d 960 (Alaska 1977); People v. Vaughn, 455 P.2d 122 (Cal. 1969); People v. Douglas, 54 Cal.Rptr. 777 (1966); Davis v. State, 277 So.2d 311 (Fla.App. 1973); Jenkins v. State, 248 S.E.2d 33 (Ga.App. 1978); State v. Darling, 419 P.2d 836 (Kans. 1966); People v. Bolden, 296 N.W.2d 613 (Mich. App. 1980); State v. Schlue, 323 A.2d 549 (N.J.App. 1974); State v. Yormark, 284 A.2d 549 (N.J.App. 1971); State v. Smith, 532 P.2d 9 (Ore. 1975); State v. Tarman, 621 P.2d 737 (Wash. App. 1980). See also Annot., Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense, 86 A.L.R.2d 1132 (1962).

However, appellant raises another objection to admissibility. He contends that allowing admission of this "other crimes" evidence, where he has been acquitted, would violate his rights under the fifth amendment to the United States Constitution, specifically the double jeopardy clause with its attendant collateral estoppel rule. Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189 (1970).[2] After a careful examination of this argument, we conclude that, in the context of this case, admission of this evidence did not violate appellant's fifth amendment rights.

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[2]There is a question whether collateral estoppel would even apply to a situation where the defendant is being prosecuted by two separate sovereigns. In the present case we are dealing with two separate offenses, one committed against one sovereign state, and another in a different sovereign state. Thus, collateral estoppel might not even apply here because the "same parties" requirement of collateral estoppel has not been met. However, for purposes of this discussion, we choose to show why, in the context of the facts presented here, collateral estoppel would not prevent a retrial of the defendant even if the same sovereign were prosecuting him.

The fifth amendment's double jeopardy guarantee applies to the states through the fourteenth amendment. Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056 (1969). In Ashe v. Swenson, supra, the defendant was charged with six counts of robbery, for robbing six participants in a poker game. After acquittal on one count, he was tried on a second count. The question before the court in Ashe was whether there exists an element of collateral estoppel in the fifth amendment guarantee against double jeopardy, as applicable to the states, that would preclude a state from retrying a defendant where the ultimate issue (in Ashe, identification of a perpetrator) had already been necessarily determined at a previous trial. The Supreme Court adopted the view that there is an element of collateral estoppel in the fifth amendment which would prevent the second trial.

One federal circuit has used the rationale in Ashe to forbid evidence of "other crimes," where a defendant has been acquitted of that crime. Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972) (evidence that defendant robbed two establishments, where acquitted of those robberies, not admissible in trial on third separate robbery). However, Ashe and Wingate are distinguishable from this case, which can best be shown by comparing the facts of the present case to the facts in King v. Brewer, 577 F.2d 435 (8th Cir. 1978), cert. den. 440 U.S. 918.

In King, the appellant, a habeas petitioner, had been convicted in state court of the robbery of a particular store. This store had been robbed at 7:00 p.m.; another store was robbed at 4:30 a.m. the following morning. Appellant was arrested and charged with both robberies. He was tried for the morning robbery first and acquitted. At the subsequent trial for the evening robbery, testimony of appellant's involvement in the morning robbery was presented. The King court first ruled that Ashe was not applicable.

> "In the Ashe case the separate charges arose out of the same transaction or occurrence. The critical issue in the Ashe case was whether Ashe was a participant, with others, in the robbery of the six players. In acquitting Ashe in the first trial, the jury found that Ashe was not a participant in the robbery of the

six players. In the second trial the jury found that he was a participant in the robbery of the six players. In contrast, in this case appellant was charged with committing two separate and distinct robberies of two different stores, separated by distance, circumstances, and time of about nine and one-half hours. These facts distinguish this case from the Ashe case." 577 F.2d at 440.

Similarly, the present case is distinguishable from Ashe. Appellant here was charged with committing two separate and distinct crimes, the murders of two separate persons, separated by time, distance and circumstances.[3]

The appellant here seeks to foreclose from consideration any alleged connection between himself and the death of Scott Currier. However, here, as in the King case, the evidence of Currier's death and its connection to appellant was not introduced for the primary purpose of showing the guilt of appellant regarding the death of Currier, but rather to explain to the jury a possible motive the appellant may have had to participate in the murder of Kimberly Palmer and to connect him with that murder. The jury in the Washington case could very well have believed that appellant had a connection with Currier's death, but that the state did not prove beyond a reasonable doubt that appellant was the actual murderer of Currier. Additionally, the Washington jury might have had a reasonable doubt on the issue of whether Currier was killed in Washington or in Idaho, and thus acquitted because of that doubt. A verdict of acquittal in

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[3]The court in King also considered the effect of the Fifth Circuit cases following Wingate. See Blackburn v. Cross, 510 F.2d 1014 (5th Cir. 1975), Expanding Double Jeopardy: Collateral Estoppel and the Evidentiary Use of Prior Crimes of Which the Defendant has been Acquitted, 2 Fla.State Univ. L.Rev. 511 (1974). In Wingate and Blackburn, the two principal cases in the Fifth Circuit, the evidence of the prior crime was primarily being introduced to prove the identity of the accused as the perpetrator of the crimes, including those crimes of which he was acquitted. Thus, the King court noted that those cases were also factually distinguishable from their own case. The evidence in King was being introduced not to show guilt of the accused in the acquitted crime, but rather to impeach the defendant's testimony of alibi. Its primary purpose was not to establish the defendant's guilt in the morning robbery.

the previous case does not preclude all possibility of knowledge on the part of appellant of the circumstances of the death of Currier. It was this evidence of knowledge on the part of the defendant that the prosecution sought to use to indicate to the jury a possible motive and implication in Palmer's death. The prosecution did not seek to prove once again that appellant was involved in Currier's death, but only sought to show that appellant had a motive to aid in a cover-up of the Currier murder by helping to eliminate Kimberly Palmer as a witness. Regardless of his guilt or innocence in Currier's death, the evidence of that death is still highly relevant in showing a possible motive for appellant's involvement in Palmer's murder. Because the verdict of acquittal did not necessarily preclude or decide finally the question of appellant's knowledge of the circumstances surrounding Currier's death or the tie-in between Currier's death and Kimberly Palmer's death, the doctrine of collateral estoppel did not preclude introduction of evidence of Currier's death at the Palmer trial.

II.

Appellant next challenges the validity of the death penalty imposed on his conviction. He asserts that the penalty is disproportionate and excessive in this case for the following reasons: (1) there was a lack of jury participation in the capital sentencing process, which participation is constitutionally required; (2) one of the aggravating circumstances in Idaho's death penalty law is unconstitutionally vague; (3) the death penalty cannot be imposed upon a defendant who is found guilty only of aiding and abetting in the murder; (4) the circumstances in this case do not provide a sufficient foundation for imposition of the death penalty. We will consider appellant's assertions in the above order.

A.

Appellant's first assertion is that involvement of the jury in the sentencing process in capital cases is constitutionally required. This assertion is disposed of by two recent cases in which we have considered this exact question and rejected the argument. In State

v. Creech, ___ Idaho ___, ___ P.2d ___ (1983), we held "that there is no federal constitutional requirement of jury participation in the sentencing process and that the decision to have jury participation in the sentencing process, as contrasted with judicial discretion sentencing, is within the policy determination of the individual states." We went on to hold that "the policy judgment of our legislature, which places capital sentencing discretion in the district judges of our state with mandatory appellate review vested in this Court of statewide jurisdiction, meets any test of constitutionality." In State v. Sivak, ___ Idaho ___, ___ P.2d ___ (1983), we again considered the question of whether the federal constitution prohibits a statutory scheme that does not provide for jury participation, and in addition, we considered the question of whether our own state constitution prohibits such a statutory scheme. We once again upheld our own statutes, rejecting the notion that the federal constitution requires jury sentencing, and also concluding that nothing in the state constitution prohibits a statute which does not provide for jury participation. Thus, this issue was thoroughly covered in both of these previous cases, and our decisions in those cases controls here.

B.

Appellant argues that the statutory aggravating circumstance found in I.C. § 19-2515(f)(6), that "the defendant exhibited utter disregard for human life," is unconstitutionally vague. The United States Supreme Court has previously required clear standards which guide the discretion of the sentencing body. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976); See also, State v. Osborn, 102 Idaho 405, 631 P.2d 187 (1981). If the language of the statutory provision itself does not contain a sufficiently clear standard, it is the duty of the state courts to place limiting constructions upon the statutory aggravating circumstances "so as to avoid the possibility of their application in an unconstitutional manner." State v. Osborn, supra at 418, 631 P.2d at 200. The aggravating circumstance challenged here has been considered in two previous Idaho cases and, with

the aid of a limiting construction placed upon it, has been upheld as constitutional. In State v. Osborn, supra, we concluded that the phrase under consideration here "is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." Id. at 419. In State v. Creech, supra, we once again upheld the constitutionality of this statutory aggravating circumstance. In light of our decisions in these two cases, further consideration of the identical argument presented here is not necessary.[4]

C.

Appellant argues that a death penalty cannot be imposed in this case because he was merely an aider and abettor, and no proof was presented that appellant was the actual killer of Kim Palmer. Appellant relies on the recent United States Supreme Court case of Enmund v. Florida, ___ U.S. ____, 102 S.Ct. 3368 (1982). In Enmund, the court considered the question of whether a person convicted only of felony murder can be sentenced to death. Enmund was the driver of the getaway vehicle in a planned robbery during which the two principals killed the victims. There was no showing that Enmund intended the killings, only that he was a knowing participant in the robbery, during which the victims were killed. The court resolved the question in Enmund's favor.

> "[I]t is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not.

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[4]Since we have decided that appellant's sentence was validly imposed because the trial court found these circumstances to exist beyond a reasonable doubt, and the circumstances withstand constitutional scrutiny, it is unnecessary for us to consider the state's argument that the sentence is also warranted under I.C. § 19-2515(f)(10), a circumstance that the trial court found existed, but ruled legally inapplicable to this case.

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> "... The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on his culpability, not on that of those who committed the robbery and shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence.'" ____ U.S. at ____, 102 S.Ct. at ____, (emphasis in original).

The court held that since Enmund's criminal culpability extended only to the robbery, imposition of the death penalty for Enmund's own culpability was excessive and disproportionate and thus a violation of the eighth amendment.

Enmund does not require a reversal of the sentence imposed in this case for several reasons. First, appellant was convicted of murder, not felony murder. Felony murder is defined as:

> "Any murder committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem is murder of the first degree." I.C. § 18-4003(d).

Under the felony murder rule, a defendant who participates in a robbery can be held liable for the death of any person killed during the commission of that robbery, regardless of the individual defendant's intent that a death occur. Appellant was convicted of aiding and abetting in the commission of a murder, an offense which necessarily involves an intent on the part of a defendant that a murder take place. We have already ruled that the evidence was sufficient to support a conviction on this charge. Although the United States Supreme Court ruled out imposition of the death penalty in a felony murder case, they did so because the felony murder offense involved in Enmund did not require, and the facts of the case itself did not warrant, a finding that the defendant entertained an intent that the victims of the robbery be killed. Such an intent to kill was required by the offense for which appellant was convicted.[5]

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[5]In addition, note:

The trial judge instructed the jury that murder of the first degree requires a clear, deliberate intent to kill on the part of the defendant. He further instructed the jury that:

> "You are instructed that all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, are principals in any crime so committed, and as principals are guilty of any crime so committed.
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> "You are instructed that to aid and abet means to knowingly assist, facilitate, promote, encourage, counsel, solicit or invite the commission of a crime." (Emphasis supplied.)

Thus, the jury would necessarily have to find that the defendant intended that a life be taken before it could find him guilty of first degree murder. This type of moral culpability is all that the United States Supreme Court would require under Enmund. Because such a moral culpability necessarily exists in the present case, imposition of the death penalty is not disproportionate and unjust.

D.

Appellant also argues that the circumstances in the present case are not sufficient to support the imposition of the death penalty. In

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"19-2515. Inquiry into mitigating or aggravating circumstances--Sentence in capital cases--Statutory or aggravating circumstances--Judicial findings.--...

....

"(f) The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed:

....

(7) The murder was one defined as murder of the first degree by section 18-4003, Idaho Code, subsections (b), (c), (d), (e) or (f), and it was accompanied with the specific intent to cause the death of a human being." (Emphasis added.)

The felony murder rule is contained in I.C. § 18-4003(d); thus, it is included in the above aggravating circumstance.

making this argument, appellant essentially reiterates some of the earlier arguments made, including that the death penalty is excessive in cases based on aiding and abetting, and that the circumstances did not reflect "utter disregard for human life." We find that this argument, being basically a reiteration of defendant's previous arguments does not merit consideration.

III.

Finally, we reach that point where we conduct our independent review of this case under I.C. § 19-2827. The purpose of our review is to examine the proceedings in the trial court to ensure that the sentence of death was imposed without resort to passion or prejudice or any other arbitrary factor; that the evidence supports the trial court's findings of statutory aggravating circumstances; and that the sentence of death is not excessive or disproportionate. I.C. § 19-2827.

In this case, all of the procedures mandated in potential death penalty cases, such as appellant's attendance at the pronouncement of sentence, written findings of the trial judge on aggravating and mitigating circumstances, etc., were followed. The state gave appellant notice that it intended to ask for the death penalty and gave notice of its intent to rely on the aggravating circumstances in I.C. § 19-2515(f)(6), -(8), and -(10). Appellant was also allowed to submit a document, which was considered by the court, outlining what he felt were the mitigating circumstances that should be considered. An aggravation/mitigation hearing was held, evidence taken, and arguments heard. I.C. § 19-2515(d). The trial court then issued written findings indicating the mitigating factors considered and the aggravating factors found beyond a reasonable doubt.

In our independent review, we note that the trial court considered testimony given by Thomas Gibson during his separate trial for first degree murder of the same victim, Kimberly Palmer. This testimony was sworn testimony given in open court, although not in the trial of this particular cause. The trial court took judicial notice of the testimony because of its ruling that appellant had "agreed to

consideration of such testimony and to dispense with formal application of I.C. § 19-2516 ...." We find no error in the trial court's ruling on this issue, considering the fact that the defendant did request that the trial court take notice of this testimony in mitigation of sentence, and the fact that the testimony itself was given under oath in an open courtroom. The testimony of Gibson, thus validly taken into consideration, further supported the notion that Kimberly Palmer was killed to cover up the murder of Scott Currier. Gibson testified that he aided in the murder of Palmer by knocking her to the ground at the Paradis house in an effort to prevent her from leaving the house after Currier's murder, so that she could not inform the authorities of what she had witnessed.

The court, in its findings, found no mitigating circumstances, and it found one statutory aggravating circumstance beyond a reasonable doubt, noting that "there is nothing which outweighs the gravity of the aggravating circumstance." This is not a case like State v. Osborn, supra, where the trial court failed to find any mitigating circumstances, but at the same time failed to set forth those mitigating circumstances which it considered. In this case, the trial court considered all of the possible mitigating circumstances urged by appellant, and also considered the possibility of the existence of six additional mitigating circumstances, but after consideration decided that none of the factors either suggested by appellant or considered by the court on its own constituted a mitigating circumstance. We find no error in the procedure followed by the trial court in making its findings.

We are also required under I.C. § 19-2827 to conduct a review of the sentence imposed, and the sentences imposed in similar cases, to assure that the sentence in this case was not excessive or disproportionate. We recently conducted an extensive review of Idaho murder cases and find that the sentence imposed in this case is not disproportionate to the sentence imposed in those cases where the death sentence was available as a form of punishment. We have also compared this case with our recent death penalty cases in State v.

Creech, supra, and State v. Sivak, supra, and find that the sentence imposed in the present case is proportionate to the sentences imposed in those cases. In fact, the crime committed in the present case is the same type of crime as that committed in State v. Sivak, supra. In Sivak, the trial court found that one of the reasons the victim was killed was to prevent her from identifying the defendant as the perpetrator of a robbery. In this case, the motive for the killing of Kimberly Palmer was identified by the trial court as a preventative measure, i.e., to prevent her from speaking to others about the circumstances surrounding the murder of Scott Currier. We find that the penalty imposed in this case is both proportionate and just.

The judgment of conviction and sentence imposed are affirmed.

DONALDSON, CJ., and SHEPARD, J., concur.

BISTLINE, J., dissenting, in which Huntley, J., concurs.

The record before us is literally fraught with error at every stage of the proceedings. However, in considering that record, I focus on but two of the more prominent errors that mandate reversal.

I.

As the majority notes, the appellant was tried in Washington for the murder of Scott Currier prior to his Idaho trial for the murder of Kimberly Palmer. Appellant was acquitted for Currier's murder by a Washington jury. Despite that acquittal, however, and over appellant's timely objection, evidence connecting appellant to Currier's death was introduced in the Palmer trial. Appellant contends that the admission of this evidence was error. I agree and would, on this basis, reverse.

The evidence submitted by the prosecution linking appellant to the Currier murder was both extensive and highly prejudicial. The proffered evidence included the following photographs of Currier's body, both at the site at which it was discovered and at the autopsy; photographs of evidence seized from appellant's house relating to Currier's murder; descriptions by investigating officers of both the murder and the evidence seized from appellant's home; a thorough description by the coroner of the autopsy performed on Currier; and even reference by a Spokane County identification officer to Currier as "the victim." All of this in a trial for the murder of Kimberly Palmer!

However, in view of the United States Supreme Court case of Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), and its progeny, it is clear that the doctrine of collateral estoppel bars the use of such evidence. Ashe applied the collateral estoppel to criminal proceedings as part of the Fifth Amendment guarantee against double jeopardy. As the Supreme Court noted:

> "For whatever else that constitutional guarantee may embrace, North Carolina v. Pearce, 395 U.S. 711, 717, it surely protects a man who has been acquitted from having to 'run the gauntlet' a second time. Green v. United States, 355 U.S. 184, 190."
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> 397 U.S. at 446.

Following the Supreme Court's lead in Ashe, the Fifth Circuit Court of Appeals applied collateral estoppel to cases such as the one before us where the state seeks to introduce evidence of prior acquitted criminal charges as evidence in a subsequent prosecution. In Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972), the Fifth Circuit Court stated:

> 'We do not perceive any meaningful difference in the quality of 'jeopardy' to which a defendant is again subjected when the state attempts to prove his guilt by relitigating a settled fact issue which depends upon whether the relitigated issue is one of 'ultimate' fact or merely an 'evidentiary' fact in the second prosecution. In both instances the state is attempting to prove the defendant guilty of an offense other than the one of which he was acquitted. In both instances the relitigated proof is offered to prove some element of the second offense. In both instances the defendant is forced to defend again against charges or factual allegations which he overcame in the earlier trial. We are in agreement with Judge Friendly's conclusion in United States v. Kramer, 289 F.2d 909 (2d Cir. 1961).
>
> > "'The Government is free, within the limits set by the Fifth Amendment, . . . to charge an acquitted defendant with other crimes claimed to arise from the same or related conduct; but it may not prove the new charge by asserting facts necessarily determined against it on the first trial, no matter how unreasonable the Government may consider that determination to be.'
> >
> > . . . .

". . . The prosecution simply may not in the course of any subsequent trial of the same parties relitigate an issue which was determined as an issue of ultimate fact in an earlier prosecution.

. . . .

". . . We hold that under Ashe where the state in an otherwise proper prosecution seeks for any purpose to relitigate an issue which was determined in a prior prosecution of the same parties, then the evidence offered for such a relitigation must be excluded from trial and the state must be precluded from asserting that the issue should be determined in any way inconsistent with the prior determination.

"It is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign has concluded he did not commit. Otherwise a person could ever remove himself from the blight and suspicious aura which surround an accusation that he is guilty of a specific crime."[1]

464 F.2d at 213-14.

See also Blackburn v. Cross, 510 F.2d 1014 (5th Cir. 1975); State v. Perkins, 349 So.2d 161 (Fla. 1977).

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1 Because the majority assumes for purposes of its argument that it is in fact the same sovereign prosecuting in both cases, I too proceed on that assumption. However, I note in passing that the doctrine of dual sovereignty is inapplicable here and would in no way interfere with the application of collateral estoppel principles to the case at bar. As appellant correctly stated in his brief to this Court:

"The dual sovereignty rule is based upon the principle that every citizen of the individual states or territories is also a citizen of the United States and thus owes 'allegience to two sovereigns, and may be liable to punishment for an infraction of the laws of either.' Bartkus v. Illinois, 359 U.S. 121, 31, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959)."

Appellant's Reply Brief, p. 4.

The majority argues in response that the Washington jury which acquitted the appellant of Currier's murder may have done so on the basis of a reasonable doubt as to whether Currier was killed in Washington or Idaho and thus acquitted because of that doubt. Further, the jury "could very well have believed that appellant had a connection with Currier's death, but that the state did not prove beyond a reasonable doubt that appellant was the actual murderer of Currier." And, finally, the majority says that "a verdict of acquittal in the previous case does not preclude all possibility of knowledge on the part of appellant of the [relevant] circumstances."[2] Supra, at 10. I contend that we

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[2] The Arizona Supreme Court was faced with a similar contention by the state in the case of State v. Little, 87 Ariz. 295, 350 P.2d 756 (1960). That case involved the admissibility of a prior narcotics charge for which the defendant was acquitted in a later narcotics prosecution on the rationale that these prior sales evidenced a common scheme or plan which encompassed the instant sale. The State argued that the verdict of acquittal meant only that the State had then failed to prove beyond a reasonable doubt all the elements of the prior offense and that, accordingly, the verdict does not necessarily disprove the fact of the prior sale, which is all that hte State sought to prove for purposes of the later case. The Arizona Court responded as follows:

> "We do not agree, however, that the effect of the prior acquittal should be determined by a strict application of the rules of res judicata or collateral estoppel. Although a verdict of acquittal may not necessarily mean that the jury found that the prior sale did not in fact take place, such a finding is a possible and indeed reasonable inference to be drawn from the verdict. Further, the relevance of the alleged prior sale as part of a plan or scheme may be doubted in the absence of proof of criminality of that prior sale. Thus, if the acquittal is based on an implied finding that the product sold was not sufficiently proved to be a narcotic or that defendant did not know that it was such, the sale could not reasonably be part of a plan knowingly to sell narcotics unless the jury in the instant action is permitted to find, contrary to the finding of the jury in the first action, that the defendant illegally and knowingly sold what was in fact a narcotic."

State v. Little, 87 Ariz. 295, ___, 350 P.2d 756, 762 (1980) (emphasis added).

need not and should not speculate as to the jury's basis of decision. The simple fact is that twelve men and women were asked to decide whether Scott Currier was murdered by Donald Paradis. They reached a unanimous decision that Paradis was "not guilty" of murdering Scott Currier. Because Donald Paradis was put once in jeopardy of this charge and succeeded in demonstrating his innocence to a jury of his peers, he should not have been forced to essentially redefend himself against that same murder charge in additional proceedings.

However, the majority also claims that "the evidence of Currier's death and its connection to appellant was not introduced for the primary purpose of showing the guilt of appellant regarding the death of Currier, but rather to explain to the jury a possible motive the appellant may have had to parcicipate in the murder of Kimberly Palmer and to connect him with that murder." Supra, at p. 10. My rejoinder is essentially two-fold. First, it is obvious that the evidence in question could not be used to show appellant's guilt with regard to the Currier murder--appellant had just been acquitted of that crime, and even the majority must agree that the double jeopardy clause precludes actually retrying a person for the same crime.[3] Thus, the majority's reasoning that the evidence of appellant's complicity in the Currier murder is not meant to actually show appellant's guilt is tautological and in fact proves too much because it will always be true. The prosecution will always want such evidence for some other reason than to prove the defendant's guilt--either

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I agree with this reasoning and find it to be especially relevant in the present circumstance, where the majority has likewise relied on a "common scheme" rationale to justify admission of the prior charge.

3 The only surprising thing about the majority's pat response is that by stating that is was not the prosecution's primary purpose to show the appellant's guilt in the Currier murder, it would seem to imply that such was perhaps a secondary purpose--a rather startling admission.

for proof of motive, intent, a common scheme or plan, or even to provide, as Judge Haman said in this case, a "rational and cohesive scenario." Such "primary" use of the evidence is precisely what was considered and rejected in Wingate and Blackburn. It should have been rejected in this case as well.

Second, if it is indeed true that the prosecution was not attempting to show that Paradis in fact murdered Currier, I wholly fail to comprehend the relevance of photographs depicting Currier's mutilated corpse and other evidence relating not to the murder of Kimberly Palmer, but to the murder of Scott Currier.[4] In view of prosecution witnesses referring to Currier as "the victim," the jury is certainly to be forgiven if it became confused as to precisely for which crime they were trying Donald Paradis. Even assuming, arguendo, that some modicum of truth existed in the conclusion of the trial court that evidence of the Currier murder was necessary to provide for the jury a "rational and cohesive scenario," was it absolutely necessary to parade before the jury all the gory details of a murder for which the appellant had been acquitted? In my view, the trial court could clearly have satisfied any such need to portray a rational and cohesive scenario by permitting the State to show the fact of Scott Currier's death and of his relationship with Kimberly Palmer, while at the same time excluding the lurid details of the event.[5] See State v. Sharp, 101 Idaho 498, 515, 616 P.2d 1034,

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[4] I have myself reviewed the photographs of Currier received into evidence against the appellant while on trial for the murder of Kimberly Ann Palmer. Although I have carefully considered including them as an attachment hereto, I have decided that the purpose served thereby--depicting better than any words the gore and butchery of Scott Currier's murder--is outweighed by a sensitivity which tells me that such should not be published. They are not photographs of the average murder victim.

[5] We note, in this respect, that the record clearly shows that the appellant offered to stipulate as to the fact of Currier's murder. What the defendant objected to throughout the trial, as defense counsel reiterated in oral argument, was the introduction of the "rather gruesome and graphic photographs and pieces of evidence from Dr. Brady," a forensic pathologist and the State

____ (1980) (Bistline, J., dissenting). Truly, the effect of the accumulated testimony concerning Scott Currier's murder was to seriously prejudice the appellant and force him to "run the gauntlet a second time," Ashe, supra, by again refuting evidence of a crime for which he had already been acquitted.

Even if this Court were not prepared to adopt the view that notions of collateral estoppel are sufficient to bar evidence of prior criminal charges for which a defendant has been acquitted, the Court, nevertheless, could and should have held the probative value of such evidence to be outweighed by the prejudice it created for the appellant. Previous Idaho case law in this area has extended the rule of State v. Needs, 99 Idaho 883, 591 P.2d 130 (1979, to evidence "of other crimes for which [defendants] have not been charged." State v. Izatt, 96 Idaho 667, 534 P.2d 1107 (1975) (emphasis added). See State v. Crawford, 99 Idaho 87, 577 P.2d 1135 (1978). But, before today it has never been the law in Idaho that evidence of prior acquitted criminal charges are admissible on any of the justifications in Needs. In this case, the defendant had been charged--and acquitted. I regret the Court's unfortunate decision to further extend the Needs rule to evidence of crimes for which the defendant has been acquitted as well as not charged, and would hold such evidence to be inadmissible.

The majority cites 86 A.L.R.2d 1132 for the proposition that "evidence of a prior acquitted crime is generally allowed if it falls within one of the recognized exceptions." Supra, at 8. However, the comments of that annotation's author are instructive in this context. After noting that, indeed, "the numerical weight of authority" had adopted the rule cited by the majority, the author states the following:

Medical Examiner for Oregon. The prosecution, however, refused on the basis that it had to have introduced all of the evidence.

"On the other hand, a few authorities take the view that, as a general proposition, evidence as to another offense of which the defendant was acquitted is not admissible. This view rests primarily on the persuasive ground that defendant's acquittal of an offense should relieve him from having to answer again, at the price of conviction for that offense or another, evidence which amounts to a charge of a crime of which he has been acquitted.

"In view of the fact that some of the courts which follow the rule under which, notwithstanding defendant's acquittal of another offense, evidence of the facts which were the basis of the prosecution is admissible concede that upon his introducing the record of acquittal, that record is to be regarded as a conclusive adjudication that the defendant did not commit the other offense, and that the jury should be so instructed, it seems preferable not to submit to the jury the facts regarding the other offense, since the impression, unfavorable to the defendant, resulting from his former arrest and the charge of crime at an earlier occasion never can be erased from the mind of the jury."

86 A.L.R.2d 1132, 1135 (1962) (emphasis added).

In addition, however, there is ample authority for the proposition that evidence of prior acquitted crimes should be excluded as involving undue prejudice to the defendant. State v. Little, 87 Ariz. 295, 350 P.2d 756 (1960); Asher v. Commonwealth, 324 S.W.2d 824 (Ky. 1959); McDowell v. State, 142 Tex.Crim. 530, 155 S.W.2d 377 (1941); People v. Milano, 59 App.Div.2d 852, 399 N.Y.S.2d 226 (1977); United States v. Gurney, 418 F.Supp. 1265 (D.C. Fla. 1976); People v. Ulrich, 30 Ill.2d 94, 195 N.E.2d 180 (1964); People v. Corbeil, 77 Mich.App. 691, 259 N.W.2d 193 (1977); State v. Kerwin, 133 Vt. 391, 340 A.2d 45 (1975); People v. Atkins, 96 Mich.App. 672, 293 N.W.2d 671 (1980); Stuart v. State, 561 S.W.2d 181 (Tex.Crim. 1978); People v. Bouton, 50 N.Y.2d 130, 428 N.Y.S.2d 218, 405 N.E.2d 699 (1980); State v. Naranjo, 94 N.M. 407, 611 P.2d 1101 (1980); State v. Anonymous, 34 Conn. Supp. 689, 389 A.2d 1270 (1978). The majority states,

in justifying the admissibility of the evidence concerning the Currier murder, that "regardless of his guilt or innocence in Currier's death, the evidence of that death is still highly relevant in showing a possible motive for appellant's involvement in Palmer's murder." Supra, at 11. However, in a similar case involving the trial court's admission of a prior criminal charge for which the defendant was acquitted on the basis that it evidenced a common scheme or plan encompassing the present criminal charge, the Arizona Supreme Court stated the following:

> "The theory is that evidence, though inadmissible for one purpose, may be admitted if relevant for a different purpose. We are unable to subscribe to this formulation as it applies to the instant situation. We agree with the recognized exceptions to the general rule excluding evidence of former offenses, because that evidence is relevant, other than as proof of the character of the defendant, and because we believe that the need for and desirability of such evidence outweigh any prejudice to the defendant. Relevancy is thus not the sole test of the admissibility of evidence; admissibility depends, rather, on a balancing of the various effects of the admission of such evidence, considered in the light of recognized rules of law governing the administration of criminal justice.
>
> "The fact of an acquittal, we feel, when added to the tendency of such evidence to prove the defendant's bad character and criminal propensities, lowers the scale to the side of inadmissibility of such evidence."
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> State v. Little, 87 Ariz. 295, 350 P.2d 756 (1960) (emphasis added).

I, too, would hold such evidence, though perhaps relevant, to be overly prejudicial and thus inadmissible.

In Idaho, the rule is clearly that "[t]he probative value of the evidence linking the defendant to the commission of the crime is to be weighed against the prejudice to the defendant and the inclusion or exclusion of such evidence is a matter for the sound discretion of the trial court." State v. Sharp, 101 Idaho 498,

501, 616 P.2d 1034, ____ (1980). In the present case, it is clear that both the introduction of evidence linking the appellant to the murder of Scott Currier, and the inflammatory nature of that evidence, were unnecessary to the prosecution's case and highly prejudicial to that of the appellant. I would therefore hold that the trial court abused its discretion in admitting such evidence and that appellant is entitled to a new trial free from the prejudice which to any rational mind was created against Paradis by introducing testimony and photographs identical to that which had been used to try Paradis in Washington for the murder of Scott Currier. There is simply no justification for the refusal of the prosecutor and the trial court to allow the stipulation which Paradis' counsel offered to make in lieu of the testimony and photographs which both the prosecutor and the court would completely destroy Paradis' right to a fair trial,

II.

A.

I.C. § 19-2827(b)(1) directs this Court that with regard to a death sentence that we shall determine whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. My best guess is that the drafter of this provision, perhaps really the original drafter from whom it was likely borrowed, forgot for the moment that the 1973 post-Furman legislature purported to remove sentencing as a jury function.[6] Irrespective of the validity of any conjecture in that

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6 "The Idaho Constitution, as first approved on July 3, 1890, an as it reads today, provides in Art. 1, § 7:

> 'Right to trial by jury.--The right of trial by jury shall remain inviolate . . . .'

That right of trial by jury as it existed at the time our constitution was adopted provided for jury participation in the capital sentencing process.

. . . .

"At the time of Furman, I.C. § 18-4004 read:

regard, the provision is there, and this Court must accept that the clear intendment thereof is that the drafter, and in turn the enacting legislature, were fearful that sentencing judges were not beyond and above being influenced by passion or prejudice in sentencing a convicted first degree murderer. I have always thought otherwise, and in fact this provision points to a flaw in the sentencing which goes hand in hand with non-jury sentencing. If a jury imposed a sentence infected with passion or prejudice, who is the best positioned to know that it has happened? Is it five appellate judges some six to twelve months later on reading a cold record? Or is it the trial judge who, immediately and at the time the sentence is imposed, has fresh in his mind all of the evidence, all of the trial proceedings, and has personally

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> 'Punishment for murder.--Every person guilty of murder in the first degree shall suffer death or be punished by imprisonment in the state prison for life, and the jury may decide which punishment shall be inflicted. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison not less than ten years and the imprisonment may extend to life.'

In its first post-Furman session (1973), the Idaho legislature deleted the jury function from I.C. § 18-4004 and made all convictions of first degree murder subject to the death penalty. This was done in an attempt to remove the 'cruel and unusual punishment' aspects disapproved in Furman."

. . . .

"After the United States Supreme Court in a series of cases declared statutes of other states which were similar to Idaho's 1973 version unconstitutional, the Idaho legislature responded in 1977 with the present statutory scheme providing for inquiry into mitigating or aggravating circumstances as set forth in I.C. § 19-2515 et seq. That amendment changed the statute back to its pre-1973 language except that it omitted restoring the jury function . . . ."

State v. Creech, ___ Idaho ___, ___, 670 P.2d 463, 477 (1983) (Huntley, J., dissenting).

observed the jurors and their reactions all through the trial and at oral summation? The answer is so self-evident as to not need the saying. But, under the present scheme the legislature's judgment is that five appellate judges on a voluminous cold record can deduce whether a sentencing judge has performed his function under the influence of passion, or of prejudice, or of both, or some other undefined "arbitrary factor." It is to expect too much that all members of a busy Court will painstakingly peruse those records and at the same time competently attend to other matters as well. Trial judges, historically, have been the first-hand arbiters who initially determine whether a jury's verdict at the guilt phase of a trial has been improperly tainted. Similarly, the jury should be the sentencer, and the trial judge, not this Court, should be the initial overseer.

B.

Today we necessarily labor under the legislative philosophy that trial judges, as sentencers, may be arbitrary, and they may, while under the influence of passion or prejudice, impose sentences of death.

With that mind, although possessed of the highest regard for the sentencing judge in this case, I am brought to the conclusion that he may, as with many of us, have little or no regard for motorcycle gangs. I am brought to the conclusion that such is reflected in his refusing to accept the proffered stipulation, and forcing Paradis into a trial which could not be fair. I am brought to the conclusion that the photographs of the murdered Scott Currier, brought into this case where the charge was the murder of Kimberly Palmer, are so gruesome that the judge in all likelihood was himself affected thereby--even though perhaps not conscious that this was so. In all candor, I admit that had I been a juror in this case, the photographs of Scott Currier's body would have done far more than prove that he was dead, and that Paradis had a motive for killing Kimberly Palmer or having

her killed. Had I been a sentencing judge, I do not believe that I could have ceased being a person at the same time, and would again concede that those photographs might very well have affected my judgment.

For these reasons, contrary to what I have previously stated in footnote 4, and mindful that my obligation as a member of this Court must outweigh any notions of sensitivity, I have concluded to append hereto a random sampling of the photographs. It is true that one picture has the worth of a thousand words. Here, indeed, words cannot adequately portray the inflammatory nature of the many photographs of the murdered Scott Currier.

HUNTLEY, J., dissenting

This case presents a very difficult dilemma for an appellate court, in that the facts tend to indicate that the defendant committed a horrible crime in a manner which fully entitles him to suffer the death penalty.

However, the trial was conducted in a manner which violates all reasonable concepts of due process and by permitting the decision to stand the majority is doing great violence to the procedural protection to which our citizens are entitled, in order to sustain a result in one case.

However costly and inconvenient it might be, I would think it better that we remand this case for a new and proper trial rather than to permit the prostitution of those safeguards of individual liberties which make it possible for this democracy to function.

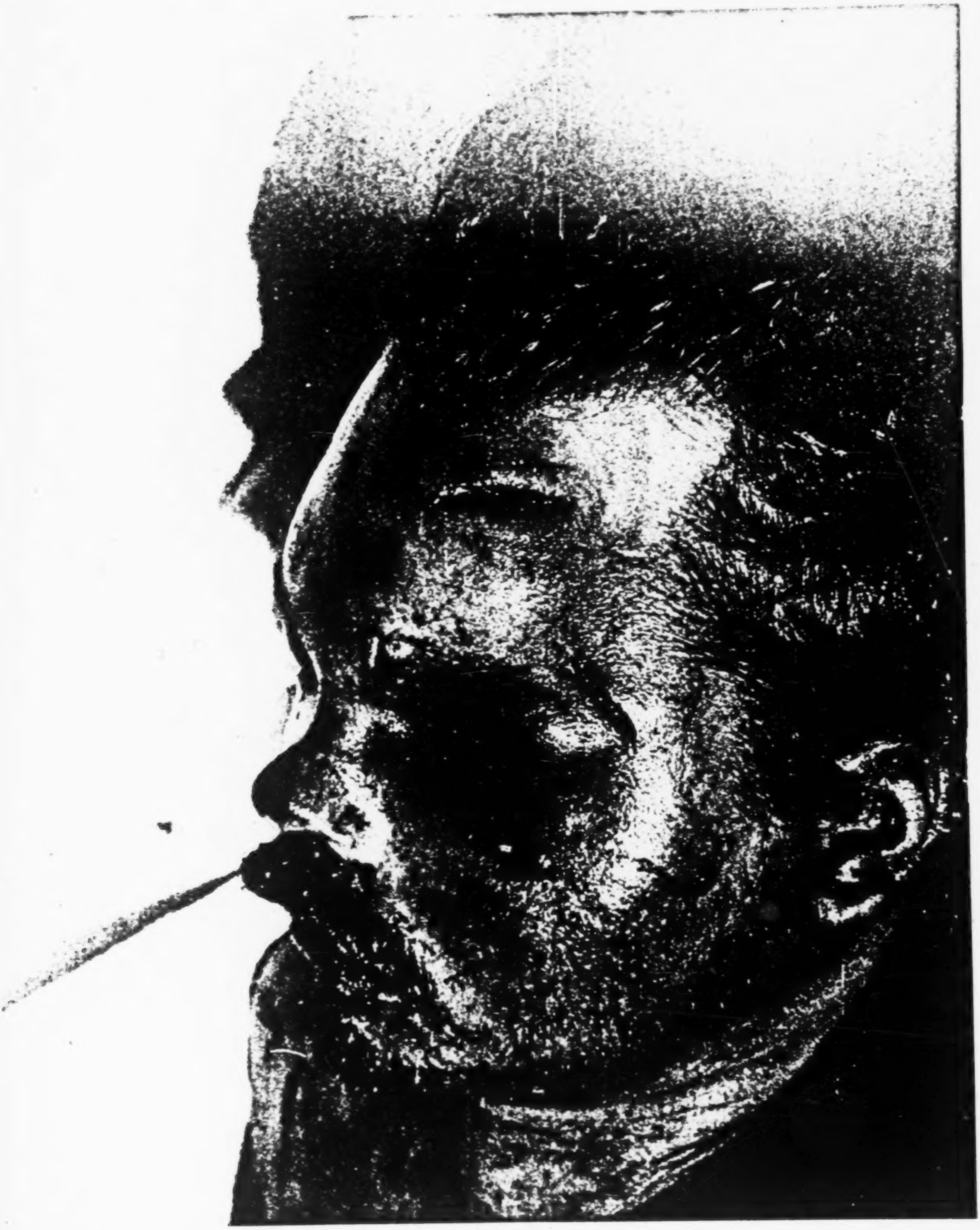
I join the dissent of Justice Bistline, and in addition I remain of the opinion that the Idaho capital sentencing process is unconstitutional in two respects, both of which could be readily corrected by rather simple legislative amendment:

(1) It does not provide for utilization of the jury, which violates both the Idaho and United States constitutions; and

(2) The sentencing proceeding, as conducted by the trial courts with the approval of this court, deprives the accused of the right to cross-

> examine and confront witnesses at the sentencing hearing and permits the admission of the presentence investigation report and other hearsay evidence.

My reasoning in this regard is set forth in detail in my dissenting opinions in State of Idaho v. Creech, __ Idaho __, 670 P.2d 463 (1983), and State of Idaho v. Sivak, ___ Idaho ___, ___ P.2d ___ (1983).



IDAHO SUPREME COURT/COURT OF APPEALS

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	O R D E R
	)	
v.	)	NO. 14565
	)	
DONALD M. PARADIS,	)	
	)	
Defendant-Appellant.	)	

COUNSEL:

The Court has ORDERED that Appellant's PETITION FOR REHEARING filed January 9, 1984, of the Court's Opinion issued December 19, 1983, be, and hereby is, DENIED.

DATED this 14th day of February, 1984.

By Order of the Supreme Court

Frederick C. Lyon

cc: Counsel of Record

Frederick C. Lyon, Clerk
Supreme Court/Court of Appeals
State of Idaho

1982 MAR -2 AM 1:31

John Rodgers

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO, Plaintiff, vs. DONALD MANUEL PARADIS, Defendant.	Case No. F 29468 FINDINGS OF THE COURT IN CONSIDERING DEATH PENALTY UNDER SECTION 19-2515, IDAHO CODE

The above defendant having been found guilty by a jury by verdict rendered December 10, 1981, of the crime of MURDER IN THE FIRST DEGREE, an offense for which the law authorizes the imposition of the death penalty; and the court having ordered a presentence investigation and thereafter having held a sentencing hearing for the purpose of hearing all relevant evidence and argument of counsel in aggravation and mitigation of the offense;

NOW, THEREFORE, the court hereby makes the following findings:

1. Conviction: That the defendant, while represented by court appointed counsel, was found guilty of the offense of Murder In The First Degree by jury verdict rendered on December 10, 1981.

2. Presentence Report: That a presentence report, including a report of mental evaluation of the defendant, was prepared pursuant to orders of the court and copies thereof were delivered to the defendant or his counsel, as well as to counsel for the plaintiff, at least seven (7) days prior to the sentencing hearing pursuant to Section 19-2515, Idaho

Code, and the Idaho Criminal Rules. That both plaintiff and the defendant have filed herein written acknowledgments of such receipt of copies of said presentence report and all portions thereof.

3. Notice of Intent To Recommend Death Penalty: That, pursuant to order entered herein on January 15, 1982, plaintiff filed herein a written notice of its intent to seek and recommend the imposition of the death penalty; that a true and correct copy of said notice was timely served upon counsel for the defendant.

4. Notice of Aggravating Circumstances: That, pursuant to order entered herein on January 15, 1982, plaintiff filed herein a written enumeration of aggravating circumstances which it intended to prove in accordance with Idaho Code Section 19-2515 in order to justify its recommendation of the death penalty; that a true and correct copy of said notice was timely served upon counsel for the defendant.

5. Notice of Mitigating Circumstances: That, pursuant to order entered herein on January 15, 1982, defendant filed herein a pre-sentence statement enumerating mitigating factors and circumstances which defendant intends to rely upon in opposing imposition of the death penalty; such statement is entitled, "Bill of Particulars as to Mitigating Circumstances" and a true and correct copy of the same was timely served upon counsel for the plaintiff.

6. Sentencing Hearing: That, pursuant to order entered January 15, 1982, a true and correct copy of which was timely served upon counsel for plaintiff and for defendant, sentencing hearing commenced to be heard on February 22, 1982, and, after being continued, was had and concluded in the presence of the defendant on February 24, 1982; that, at said hearing the court heard relevant evidence in mitigation of the offense, arguments of counsel, and a statement by the defendant. That the plaintiff presented no evidence at such hearing but advised

the court that it was relying upon the evidence admitted at trial.

7. Facts and Argument Found in Mitigation: The defendant has filed herein a document entitled, "Bill of Particulars as to Mitigating Circumstances", listing and commenting upon mitigating factors which the defendant contends preclude imposition of the death penalty. These are considered in the order that they have been presented by the defendant.

a. That there is no evidence of the defendant's guilt. In large part, the document filed by the defendant simply reiterates his contention that he is not guilty. Thus, the defendant states that there is no evidence that the defendant killed Kimberly Ann Palmer, was present when she was killed, or in any way participated in her killing. The defendant further contends that the testimony of Aera Beaver during the trial, coupled with the testimony of Roseanna Moline heard during hearing upon motion for new trial, and the testimony of Thomas Henry Gibson, related during the trial of State v. Gibson, Kootenai County Case No. F 29470 [1], all support his claim of innocence. While the defendant is correct in his assertion that Ms. Moline, Ms. Beaver, and Mr. Gibson all testified that the defendant was not present when Kimberly Palmer was killed, the testimony is contradictory and, at least with respect to that given by Ms. Moline, nearly incredible as was more fully addressed in the court's opinion relating to the motion for new trial.

The most significant problem concerning the claim made by the defendant that there is no evidence of his guilt is that the jury found to the contrary. In any event, such contention

[1] Since the defendant has referred to the testimony of Ms. Moline and Mr. Gibson, the court will take judicial notice of such testimony despite the fact that such evidence was not received during the aggravation-mitigation hearing, but was received during the course of other proceedings. The court deems that the defendant has impliedly agreed to consideration of such testimony and to dispense with formal application of I.C. 19-2516 as to the same.

of lack of guilt is not found to be a mitigating factor relating to possible punishment.

b. Evidence concerning death of Scott Currier: The defendant's "Bill of Particulars" contains an objection to consideration of any evidence concerning the death of Scott Currier, whose body was found together with that of Kimberly Ann Palmer in Kootenai County, Idaho, but who was killed at the Spokane residence of the defendant according to the contentions of both the defendant and the plaintiff.[2] The court's rulings concerning the admission of such evidence during trial may be the subject of allegations of error on appeal, but such evidence will be considered insofar as it relates to possible imposition of the death penalty. In any event, the evidence relating to the death of Scott Currier is certainly not a mitigating factor with respect to punishment.

c. Defendant's prior record: The defendant comments upon his prior record as disclosed by the presentence report. In effect, the defendant states that it is not as bad as it might appear to be; it is stated that the record shows only nineteen convictions, only two of which involve felonies. The court considers that statement to be accurate, but does not find that the defendant's prior record in any way is a mitigating factor.

d. Defendant's religious convictions: The defendant submits that his religious convictions should be considered as a mitigating factor in considering whether or not the death penalty should be inflicted. There is little doubt that at times during the defendant's life he has expressed a sincere interest in religion or that, while incarcerated awaiting trial

[2] The defendant was found not guilty of the crime of Murder In The First Degree relating to the death of Currier as the result of trial had in the State of Washington.

has successfully completed courses in Bible study. The presentence report, the psychological evaluation, testimony and exhibits adduced during the aggravation-mitigation hearing, and the statements of the defendant himself all support such conclusion. But it appears to the court from these same sources that the defendant has not at all times during his life had such religious convictions, or, at least he has on a number of occasions conducted himself in a manner which would conflict with the tenets of such convictions. When the defendant is good, he appears to be very good; when he is bad, he has been very bad. His life seems to have vacillated between the two extremes.

It does not appear that the defendant was involved in any religious activity during the events leading to the death of Kimberly Palmer, or that he was leading the life of a religious person at the time or during the year or so before then. The court does not find that the defendant's past or present religious convictions are mitigating factors to be considered with respect to imposition of the death penalty.

In addition to the possible mitigating circumstances urged by the defendant and discussed above, the court has considered the following potential mitigating circumstances:

a. Age: The defendant is 32 years old. This fact, in and of itself, is unremarkable and is not found to be a mitigating circumstance.

b. Family background: As reported in the presentence report, the defendant is an adopted child. His adoptive father is deceased. His adopted mother, who is not in good health, continues to reside in Massachusetts. There are no siblings. The defendant has not kept in particularly close contact with his mother or other relatives in recent years.

The court finds nothing in the defendant's family background which it considers to be a mitigating circumstance.

c. Marital status/children: The defendant was

married while incarcerated awaiting trial. He has one minor child by a prior marriage whose whereabouts he does not know. The court finds nothing in this which would constitute a mitigating circumstance.

d. Mental or emotional state at the time of the murder: There is no evidence to suggest that the defendant was influenced by any extreme mental or emotional disturbance at the time of the murder.

e. Capacity to appreciate criminality of conduct or to conform conduct to the requirements of law: There is no evidence to suggest that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was in any way impaired by mental desease or defect or by intoxication, and, in fact, the report pertaining to the psychological evaluation indicates to the contrary. There has been no evidence submitted to the effect that the defendant was under the influence of any controlled substance at the time of the commission of the murder.

f. Extent of cooperation with police: There is no evidence that the defendant has cooperated with the police in any way concerning the death of either Kimberly Ann Palmer or Scott Currier.

8. Facts and Argument Found In Aggravation: Pursuant to order entered on January 15, 1982, the plaintiff has filed herein a document stating which of the aggravating circumstances enumerated in Idaho Code Section 19-2515(f) upon which it was relying to justify the imposition of the death penalty. That document, which was filed prior to the holding of the aggravation-mitigation hearing, states that the plaintiff relies upon and intends to prove the statutory aggravating circumstances set forth in subsections (6), (8), and (10) of Idaho Code Section 19-2515(f).

It is the plaintiff's position that the evidence shows beyond a reasonable doubt that:

(1) By the murder, or the circumstances surrounding its commission, the defendant exhibited utter disregard for human life; I. C. 19-2515(f)(6), and,

(2) That defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit a murder which will probably constitute a continuing threat to society; I. C. 19-2515(f)(8), and,

(3) The murder was committed against a witness or potential witness in a criminal or civil legal proceeding because of such proceeding.

In support of its position, the plaintiff has set forth in its written enumeration of such claimed aggravating circumstances a brief statement of the reasons for the contention that such aggravating circumstances should be found by the court. The State argmented such statements by argument at the hearing and, by sentencing brief filed herein, asks that the court consider the testimony of Thomas Henry Gibson related during the trial of State v. Gibson, Case No. F 29470, as well as a statement made by Cynthia Simera to police authorities which statement is contained in the presentence report.

As previously noted herein, the Defendant has also asked that Mr. Gibson's testimony be considered with respect to the aggravation-mitigation hearing, and, by such request, it is the opinion of the court that the defendant has impliedly agreed to dispense with the formal requirements of I. C. 19-2516 with respect to such testimony.

However, the defendant has not in any manner agreed to a consideration of the statment of Ms. Simera, and, in fact, has objected to the court doing so. I. C. 19-2516 specifically mandates that:

> "The circumstances must be presented by the testimony of witnesses examined in open court, x x x No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or be received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section.
>
> I. C. 19-2516

The preceding section mandates that a presentence report must be ordered and provides that,:

> "Evidence admitted at the trial shall be considered and need not be repeated at the sentencing hearing."
>
> I. C. 19-2515

The Idaho Supreme Court has held that:

> "Where the defendant expressly or impliedly agrees to dispense with the formality possible under the statute, i.e., the presentation of all statements orally and under oath, and instead allows presentation of the facts through prior evidence, presentence reports, argument of counsel, and the like, we find no prima facie error due to such use."
>
> State v. Osborn, 102 Idaho (1982)

Thus, it seems that where, as here, the defendant asks that the court consider matters which have not been presented in open court via "live" testimony as required by I. C. 19-2515, (such as the prior trial testimony of Mr. Gibson), such testimony can be considered. However, where the defendant does not so agree, the court is limited by the mandate of I. C. 19-2516 to the trial testimony and to such testimony as is presented by witnesses at the hearing (albeit, the normal rules of evidence obtaining at trial may not be strictly applicable).[3]

Thus, in considering the question of whether or not there are aggravating circumstances in this case, the court can look to the following:

1. The evidence admitted at trial.

2. The testimony of Thomas Henry Gibson admitted during the trial had in Kootenai Case No. F 29470.

3. The testimony of Roseanna Moline received during the hearing concerning the motion for new trial.

[3] Seemingly, and despite the fact that I. C. 19-2515 mandates that a presentence investigation be had, the normal report resulting from such investigation could well be considered a "representation" which could not be considered unless the defendant impliedly or expressly agreed thereto.

4. Those portions of the presentence report not objected to by the defendant, including the report of psychological evaluation.

5. Arguments of counsel.

6. Oral statement of the defendant.

Based upon the foregoing, and in order to properly evaluate the contentions of the plaintiff concerning aggravating circumstances, the court makes the following findings of fact concerning the circumstances surrounding the commission of the murder; it is found, beyond a reasonable doubt, that:

a. On June 21, 1980, Kimberly Ann Palmer was a female human being, weighing approximately 100 pounds and being approximately 5'4" in height.

b. Prior to June 21, 1980, Kimberly Ann Palmer was only slightly or not at all acquainted with the defendant, having only seen and possibly met the defendant once or twice before during the preceding few weeks.

c. Shortly after 12:45 o'clock a.m. on June 21, 1980, Kimberly Ann Palmer accompanied one Scott Currier to a certain residence located at South 24 Dearborn Street in Spokane, Washington, which residence was then being rented by the defendant, Donald Manuel Paradis, who also resided there at the time.

d. Present at said residence at the time stated were Thomas Henry Gibson, Charles Amacher, Cindy Simera and Roseanna Moline; that the defendant and one Larry Evans were also present at least at certain times during the days of June 20 and June 21, 1980. While it is probable that both Evans and the defendant were present at the residence at times when Scott Currier and Kimberly Ann Palmer were present, the court cannot so find such fact beyond a reasonable doubt based upon the evidence which it can consider pursuant to I. C. 19-2516.

e. Sometime after 12:45 o'clock a.m. and 6:45 o'clock a. m. on June 21, 1980, at the Dearborn Street residence ,

an altercation ensued involving Scott Currier, on one side, and the male persons who were present at the residence, on the other.

f. As the result of such altercation, Currier was brutally beaten, receiving massive head wounds from which he died at such residence during the early morning hours of June 21, 1980.

g. Following the death of Currier, and at some time between 12:45 o'clock a.m. and 6:45 o'clock a.m. on June 21, 1980, Currier's body was put into a sleeping bag which, in turn, was placed into Currier's Volkswagen van which had been parked outside the residence.

h. The Volkswagen van was then driven to a location on Mileck Road, south of the City of Post Falls in Kootenai County, Idaho.

i. That the defendant, Gibson, and Evans were in the van (with one of them driving it) at the time it arrived at such location. That Gibson was an occupant of the van from the time that it left the Dearborn Street residence; that it is highly likely that Evans and the defendant were also in the van from that point, but the court cannot find that fact beyond a reasonable doubt. It is found beyond a reasonable doubt, that either Evans and the defendant accompanied Gibson from the residence, or, that they joined Gibson enroute to the Mileck Road location.

j. Kimberly Ann Palmer was also transported in such vehicle from the Dearborn Street residence to the Mileck Road location at the same time as was the body of Scott Currier.

k. Kimberly Ann Palmer was alive at the time.

l. The character of the Mileck Road location is wooded and isolated from any nearby dwelling houses or other inhabited structures.

m. After reaching said location, the body of Scott Currier was removed from the vehicle and, while still inside

the sleeping bag, was drug into the bushes and undergrowth a short distance off Mileck Road.

n. At approximately the same time that Currier's body was being disposed of, Kimberly Ann Palmer was killed at a location approximately 90 feet off Mileck Road, which location was across an old barbwire fence from the road and near a small stream.

o. That during the early morning hours of June 21, 1980, Kimberly Ann Palmer was killed by means of manual strangulation and her body was left face down in said stream.

p. That either the defendant, Thomas Henry Gibson, or Larry Evans actually killed Kimberly Ann Palmer.

q. That the defendant either directly committed the act constituting the premeditated murder of Kimberly Ann Palmer or aided and abetted in its commission.

r. Kimberly Ann Palmer did nothing to provoke the acts resulting in her death.

s. The sole reason and motive for the killing of Kimberly Ann Palmer was to permanently insure that she would not reveal to anyone the circumstances resulting in the death of Scott Currier.

In making such findings, the court has considered the argument of the defendant that two individuals who were present at the Dearborn Street residence during the early morning hours of June 21, 1980, have testified that the defendant, Donald Paradis, was not present at the time when Kimberly Ann Palmer was killed, and that these same individuals testified that she was killed at the Dearborn Street residence in Spokane, Washington.

Thomas Henry Gibson testified during his trial. According to Mr. Gibson, the defendant, Paradis, was present at the residence and did participate in the killing of Scott Currier; however, Gibson says that Paradis then left and that Kimberly Palmer was strangled by Larry Evans after Gibson had

knocked Miss Palmer unconscious as she attempted to escape from the house.

Roseanna Moline says that, while she can't be absolutely certain, to the best of her knowledge, Mr. Paradis was not present when Currier was killed. Furthermore, she says that Gibson strangled Miss Palmer and that she (Moline) observed Gibson engaging in sexual intercourse with a dead or unconscious Miss Palmer on the kitchen floor of the residence shortly prior to 7:00 o'clock a.m. on June 21, 1980. Ms. Moline doesn't mention Mr. Evans as being present.

The court has also considered the fact that another witness, Aera Beaver, says that the defendant was with her during the times in question, and, in fact, until nearly the same time when the defendant was, according to Gibson, with Gibson and Evans dumping the bodies of Currier and Palmer at the Mileck Road location (a distance of perhaps 20 miles from the residence).

The defendant also states that he was not present when Miss Palmer was killed.

So, Gibson says Evans did it, Moline says Gibson did it, Evans has never been apprehended, Beaver says Paradis was with her and couldn't have done it, and Paradis says the same. Against this contradictory evidence, the State produced circumstantial evidence which, when buttressed by the opinion testimony of forensic pathologist William Brady, convinced each member of two juries, beyond a reasonable doubt, that Kimberly Ann Palmer was indeed killed in Idaho and at least by Mr. Gibson and Mr. Paradis acting as principals.

9. Statutory Aggravating Circumstances Found Under Section 19-2515(f): It is the finding of the court that the evidence adduced at trial, and relied upon by the State during the aggravation-mitigation hearing, shows, beyond a reasonable doubt, that the murder and the circumstances surrounding its commission, that the defendant exhibited utter disregard for

human life within the meaning of Idaho Code Section 19-2515(f)(6).

In explaining such finding, the court cannot improve upon its explanation set forth in its Findings Of The Court In Considering Death Penalty rendered in State v. Gibson, Kootenai Case No. F 29470. There the court stated:

> "The facts found hereinabove leave no doubt that the killing of Kimberly Ann Palmer was an unprovoked killing of a defenseless human being accomplished in a coldly premeditated fashion for the sole reason of insuring her silence concerning the death of Scott Currier. If the phrase, "utter disregard for human life" means "cold-blooded" or"pitiless", then it is difficult to conjure up a situation in which the taking of a human life could be greatly more "cold-blooded" or "pitiless". The court believes that the term, "cold-blooded" means that, after having considerable time to reflect upon the situation and consider available options, the perpetrator coolly and deliberately decides to take a human life. That is the situation presented in this case. The term, "pitiless" adds little, if anything.
>
> Even though, as has been mentioned, the State has withdrawn its contention that the circumstances show the existence of a statutory aggravating circumstance under Idaho Code Section 19-2515(f)(10), the applicability of that subsection to the case at hand has not been lost. Subsection (10) provides that it is a statutory aggravating circumstance if the murder was committed against a witness or potential witness in a criminal or civil legal proceeding because of such proceeding (emphasis added). The State recognized that it could not prove the existence of such an aggravating circumstance, but only because it was obvious that there was no criminal or civil proceeding commenced at the time of the acts involved, and, therefore, it could not be shown that the murder was committed against a witness or potential witness because of such proceeding.
>
> However, there is little question that the legislative intent in enacting I. C. 19-2515(f)(10) was aimed at essentially the same societal objectives as are presented by the factual situation in this case. Thus, a murder committed to prevent one from becoming a witness in a future criminal proceeding, or for the purpose of eliminating the possibility of such a proceedings, or simply to prevent a person from reporting a crime to the police, differs from a murder committed because of a pending proceeding only by reason of the stage at which the processes of the criminal justice system have moved the matter. It is doubtful that the victim or a potential victim would deem that to be significant, and the essential motive in the mind of the perpetrator is the same. And, while the legislature, in enacting subsection (10) cannot be presumed to have simply repeated subsection (6) of I. C. 19-2515(f), it

is clear that there is a relationship among all of the subsections and an inescapable overlapping.

Thus, the killing of a witness, or potential witness, exhibits the same type of cool, calculated, deliberate, and unprovoked taking of a human life as would be necessary to sustain a finding under I. C. 19-2515(f)(6), and, while there was no pending civil or criminal proceeding yet involved at the time of the murder of Kimberly Ann Palmer, it is the finding of this court that the motive for the killing of Kimberly Ann Palmer in and of itself is substantial evidence that the commission of her murder was accomplished for reasons, and under circumstances which exhibit an utter disregard for human life pursuant to I. C. 19-2515(f)(6).

With respect to the defendant's argument that the evidence must show that the defendant directly committed the offense charged, there is no doubt that no such finding can be made. It can be found beyond a reasonable doubt, and the jury did so find, that the defendant either directly committed the act or aided and abetted in its commission. The court has been provided with no authority which holds that the general law applicable to persons convicted as a principal for a criminal offense (Idaho Code Section 18-204) is altered in any manner because the potential penalty involved is death. Thus, it requires no citation of authority to state that the law in Idaho has long been that a person who aids and abets in the commission of a crime is equally guilty as one who directly commits the act; and, of course, is subject to receiving the maximum punishment allowed by law. The crime of Murder In The First Degree can be punished by death. Idaho Code Section 18-4004. Neither that section of the Code nor the sentencing provisions of I. C. 19-2515 provides for any different penalty in the event the conviction was had upon the basis that the defendant only aided and abetted in the commission of the crime.

It must, therefore, be concluded that the legislature intended that a person who aided and abetted in the commission of the crime of Murder In The First Degree could be sentenced to death providing that the circumstances were such that the imposition of the death penalty was warranted pursuant to the provisions of Idaho Code Section 19-2515.

Undoubtedly, not every case involving a person convicted of the crime of Murder In The First Degree for aiding and abetting in a killing would involve circumstances which would justify the finding of an aggravating circumstance pursuant to Idaho Code Section 19-2515(f). It is apparent in this case, however, that, should the other two individuals who were involved be convicted of the same crime, they could make exactly the same claim as the defendant is making in this case. Thus, even though the murder, or the circumstances surrounding its commission, would warrant the finding of a statutory aggravating circumstance, the mere fact that there was more than one perpetrator would prevent such a finding in many cases if the defendant's argument is valid.

> It is not difficult to imagine analogous situations. Assume that three individuals are convicted of Murder In The First Degree for the killing of an executive officer because of the exercise of his official duty. One is convicted solely as a principal because he planned and encouraged the assassination. The other two both fired bullets into the body of the victim, but only one bullet was fatal and there is no evidence which would permit a determination as to which person fired the fatal shot. Obviously, the murder would justify the finding of a statutory aggravating circumstance under I. C. 19-2515(f)(9). However, if, as defendant here argues, such a finding can only be made as against the person who directly accomplished the act of killing, no such finding could be had as against any of those involved, regardless of the degree of culpability.

In this case the plaintiff has not withdrawn its contention that the circumstances surrounding the commission of the murder show the existence of a statutory aggravating circumstance under Idaho Code Section 19-2515(f)(10). Thus, in this case the State is maintaining that the murder was committed against a witness or potential witness in a criminal or civil proceeding because of such proceeding.

It is the conclusion of the court that the existence of the phrase, "because of such proceeding" precludes such a finding. As noted in the Gibson findings (and as there conceded by the State), there was no proceeding commenced at the time the murder was committed. Thus, it cannot be found that the murder was committed because of it . . . it was committed, rather, in order to preclude the commencement of such a proceeding.

The court continues to adhere to its views expressed in the Gibson findings concerning the relationship of subsections 6 and 10 of I. C. 19-2515(f), however.

With respect to the contention of the plaintiff that the defendant, by prior conduct, or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society, the court cannot find, beyond a reasonable doubt, that such an aggravating circumstance exists under the evidence

which can be considered.

Such contention is grounded almost entirely upon the State's contention that the defendant was involved in the murder of Scott Currier. The only evidence of that which the court can consider is from the testimony of Thomas Gibson (together with the fact that Currier was killed in the defendant's residence). While such a finding could be sustained if the test were a preponderance of the evidence, the court cannot find from the evidence which it can consider that the defendant participated in the killing of Currier "beyond a reasonable doubt."

10. Reasons Why Death Penalty Was Imposed: As set forth hereinabove, the court has found one (1) statutory aggravating circumstance to exist. Idaho Code Section 19-2515(b) provides that, "Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust."

The court has found no mitigating circumstances; therefore, there is nothing which outweighs the gravity of the aggravating circumstance.

As was stated in the Gibson findings, the murder that was committed in this case was not what might be called a "commonplace" murder, or what has sometimes been described as a "normal" murder (if that can be possible). It did not involve an interfamilial situation or persons who were previously closely associated as do many, if not most, murders. There was not even a hint of any emotional upheaval as is often the case. There is no evidence that the use or abuse of alcohol or any controlled substance contributed to the situation as is usually the situation in the so-called "common" murder. It was a murder committed in a cool, deliberate

manner for a specific purpose, i.e., to cover up a prior murder.

The court is aware that the defendant, just as was the case with Mr. Gibson, denies involvement in the murder of Kimberly Ann Palmer, and further contends, as did Gibson, that Miss Palmer was killed in Washington in any event. With respect to the latter contention, two juries have found to the contrary on literally the same evidence, that is, they found, beyond a reasonable doubt that Kimberly Ann Palmer was killed in Kootenai County, Idaho.

Having found that fact beyond a reasonable doubt, the rhetorical question is raised: who did the evidence show to be at the scene of her death at the time of her death? The answer, of course, is Donald Manual Paradis, Thomas Henry Gibson, and Larry Evans. One fact is known to an absolute certainty . . . Kimberly Ann Palmer is dead and she died on June 21, 1980. Somebody killed her as the result of manual strangulation. Given the motive and the transporting of Miss Palmer and the body of Scott Currier to Mileck Road, it is preposterous to think that Larry Evans acted alone and that Mr. Gibson and the defendant did not at least aid and abet in the murder.

It is the opinion of the court, that the imposition of the death penalty in this case would not be unjust, and that the imposition of any other penalty would seriously depreciate the seriousness of the crime committed.

CONCLUSION

That the death penalty should be imposed on the defendant for the capital offense of which he was convicted.

The court having made the above findings in accordance with Idaho Code Section 19-2515 and Rule 33.1 of the Idaho Criminal Rules, now therefore,

IT IS HEREBY ORDERED that the above-named defendant appear before the court at 1:30 o'clock p.m., on Thursday,

April 8, 1982, for pronouncement of Judgment and Sentence herein.

ENTERED this 2nd day of April, 1982.

Gary M. Haman, District Judge

I hereby certify that I hand delivered a true and correct copy of the foregoing FINDINGS OF THE COURT IN CONSIDERING DEATH PENALTY UNDER SECTION 19-2515, IDAHO CODE, to:

Mr. Marc Haws, Chief Deputy Prosecuting Attorney
Kootenai County, Idaho

Mr. William V. Brown, Attorney for Defendant
206 Elder Bldg., Coeur d' Alene, Idaho

this 2ND day of April, 1982.

CAROL DEITZ,
Clerk of the District Court

By: JoAnn Rodgers
Deputy Clerk

Copies to:

Hon. James Towles
Hon. Dar Cogswell
Hon. Watt E. Prather

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff, vs. DONALD MANUEL PARADIS, Defendant.	REPORT ON IMPOSITION OF DEATH PENALTY UNDER SECTION 19-2837, IDAHO CODE.

The court having sentenced the above defendant to death for the conviction of the offense of MURDER IN THE FIRST DEGREE,

NOW THEREFORE, the court hereby makes a report to the Idaho Supreme Court pursuant to section 19-2827, Idaho Code, as follows:

1. Facts regarding defendant:

   (a) Age: 33

   (b) Sex: Male

   (c) Race: Caucasian

   (d) Marital Status: Married

   (e) Family Relationships: Adoptive father deceased, adoptive mother, no siblings

   (f) Dependants: Wife, one daughter from common-law relationship

   (g) Occupation or Trade: Equipment operator, laborer, cook (see attached Presentence Report)

   (h) Educational Background: GED, one year of Bible College (see attached Presentence Report)

   (i) Relationship to Victim of Offense: None

2. Name and Address of Counsel Representing Defendant: William V. Brown, 206 Elder Bldg, P. O. Box 687, Coeur d' Alene, Idaho, 83814

3. Summary of any Prior Convictions of Defendant: See attached Presentence Report

4. Findings in Support of Imposition of Death Penalty Made Pursuant to Section 19-2515, Idaho Code. A copy is attached.

5. Date Set in Sentencing for Execution: May 26, 1982.

DATED: April 7th, 1982.

Gary M. Haman, District Judge

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO, Plaintiff,	)	Case No. F 29468
vs.	)	JUDGMENT AND SENTENCE
DONALD MANUEL PARADIS, Defendant.	)	

The above-entitled matter came on to be heard before the Honorable Gary M. Haman, one of the Judges of the above-entitled Court, on Wednesday, April 7, 1982, pursuant to previous order of the Court entered April 5, 1982. The Plaintiff, State of Idaho, was represented by Marc Haws, Deputy Prosecuting Attorney for Kootenai County, Idaho; the Defendant was personally present in court and was represented by William V. Brown, Attorney-at-Law.

WHEREUPON, the presentence report previously ordered having been filed herein, and the Court at a previous hearing held February 24 and 25, 1982, having ascertained that the Defendant had had an opportunity to read said report, and all parts thereof, and the Defendant having been given an opportunity to explain, correct, or deny parts thereof, and the Court having heard the same as well as having heard testimony and argument in mitigation and aggravation pursuant to Idaho Code Section 19-2515, and the Defendant at such hearing having advised the Court that he had no legal cause to show why judgment and sentence should not be pronounced against him, and the Court

thereafter having entered Findings of the Court in Considering Death Penalty Under Section 19-2515, Idaho Code, the Court did then pronounce its Judgment and Sentence in accordance with said Findings and as follows:

With respect to the charge stated in the Information on file herein, and pursuant to the verdict of the jury rendered herein as set forth in the Order of the Court entered December 10, 1981, a copy of which is attached hereto and, by reference, incorporated herein,

IT IS HEREBY ORDERED, AND IT IS THE JUDGMENT OF THIS COURT THAT YOU, DONALD MANUEL PARADIS, ARE GUILTY OF THE CRIME OF MURDER IN THE FIRST DEGREE as charged in said Information and as found by the unanimous verdict of the jury; and,

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that you be, and you hereby are, sentenced to suffer death in accordance with the provisions of Idaho Code Section 18-4004 and in the manner prescribed by Chapter 27 of Title 19, Idaho Code, said sentence to be executed on May 26, 1982, at the Idaho State Penitentiary, Boise, Ada County, Idaho.

IT IS HEREBY FURTHER ORDERED that you be, and hereby are, remanded to the custody of the Kootenai County Sheriff, there to be held until such time as demand is made for delivery to the duly authorized guard of the Idaho State Department of Corrections and for transportation by said guard to the said Idaho State Penitentiary.

ENTERED at Coeur d' Alene, Kootenai County, State of Idaho, this 7th day of April, 1982.

Gary H. Haman, District Judge

I hereby certify that I have mailed a copy of the foregoing JUDGMENT AND SENTENCE to the following:

Marc Haws, Chief Deputy Prosecuting Attorney
Kootenai County, Idaho (placed in interoffice mailbox)

William V. Brown, Attorney for Defendant
P. O. Box 687, Coeur d' Alene, Idaho 83814

this 7th day of April, 1982.

CAROL DEITZ,
Clerk of the District Court

By: J. Ann Rodgers
Deputy Clerk

83-6653

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO._____

DONALD M. PARADIS, Petitioner,

v.

STATE OF IDAHO, Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioner, Donald M. Paradis, who is now held in an Idaho State penitentiary, asks leave to file the attached Petition for a Writ of Certiorari to the Supreme Court of the State of Idaho without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The petitioner's affidavit in support of this motion is attached hereto.

William V. Brown

William V. Brown
Counsel for Petitioner
P. O. Box 687
Coeur d'Alene, Idaho 83814

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Supreme Court No. _____

DONALD M. PARADIS, Petitioner,

vs.

STATE OF IDAHO, Respondent.

PETITION FOR WRIT OF CERTIORARI

AFFIDAVIT OF DONALD M. PARADIS

STATE OF IDAHO)
) ss
County of Ada)

I, DONALD M. PARADIS, being first duly sworn on oath, depose and say that:

1. I am the Petitioner in the attached Petition for Writ of Certiorari;

2. I have no income nor prospect of income due to my incarceration in the Idaho State Penitentiary under sentence of death;

3. I have no bank accounts or assets other than my personal effects which are worth less than $1000.00 total value;

4. All the State courts below found me to be an indigent person unable to afford counsel or costs;

5. My financial position is no better now than when the Idaho courts appointed counsel for me;

6. Because of my poverty I am unable to pay fees or costs or give security therefor; and

7. My motion to proceed in forma pauperis and my accompanying Petition for Writ of Certiorari are made in good faith upon my belief I am entitled to relief from the sentence of death.

DATED this 14th day of March, 1984.

Donald M. Paradis
DONALD M. PARADIS

STATE OF IDAHO)
) ss
County of Ada)

On the 14th day of March, 1984, before the undersigned Notary Public in and for the State of Idaho, personally appeared DONALD M. PARADIS, known to me to be the person whose name is subscribed to the foregoing Affidavit, and he acknowledged to me that he executed the same as his free and voluntary deed.

William V. Brown
Notary Public in and for
the State of Idaho
Residing at: Post Falls
Commission expires: Life

83-6653

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. _____

DONALD M. PARADIS, Petitioner,

v.

STATE OF IDAHO, Respondent.

PETITION FOR WRIT OF CERTIORARI

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, DONALD M. PARADIS, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

Whether a prior acquittal bars admission of evidence concerning the prior murder, and whether imposition of the death penalty violates the 6th Amendment and the 14th Amendment to the Constitution of the United State where the jury did not participate in the imposition of the capital sentencing process in violation of my constitutional rights.

I further swear that the responses which I have made to the questions and instruction below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

ANSWER: No, I am not. I was last employed in summer of 1980 as a motorcycle mechanic on a self-employed basis.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

ANSWER: No, I have not.

3. Do you own any cash or checking or savings account?

ANSWER: Yes, I have a little less than $1,000.00 in a prison account.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property?

ANSWER: No, I do not.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

ANSWER: The only dependent I have is myself.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

DATED this 26 day of April, 1984.

Donald M. Paradis
DONALD M. PARADIS
Petitioner

Subscribed and Sworn To before me this 26th day of April, 1984.

Notary Public in and
for the State of Idaho
Residing at: Boise, Idaho
Commission expires: June 5

No. 83-6653

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DONALD M. PARADIS

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

LYNN E. THOMAS
Solicitor General
State of Idaho
Statehouse
Boise, Idaho 83720
Telephone: (208) 334-2400

ATTORNEY FOR RESPONDENT

WILLIAM V. BROWN
P. O. Box 687
Coeur d'Alene, ID 83814
Telephone: (208) 667-1250

ATTORNEY FOR PETITIONER

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No. 83-6653

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DONALD M. PARADIS,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

STATEMENT OF THE CASE

Petitioner, Donald M. Paradis, was convicted of murder in the first degree for the killing of Kimberly Ann Palmer. Paradis, at the commencement of his trial, moved orally to exclude any evidence concerning the death of a second individual, Scott Currier (based upon Paradis's prior acquittal in Washington of Currier's murder). The trial court held the evidence admissible to portray a "rational and cohesive scenario" and denied the motion. During the trial, Paradis continued to object to the introduction of certain evidence concerning Currier's death. These objections were generally overruled and the evidence admitted. See, State v. Paradis, 676 P.2d 31 (Idaho 1983).

Following his conviction, the trial court sentenced Paradis to death. Idaho law provides that the trial court, without the participation of the jury, shall make sentencing decisions in capital prosecutions. Idaho Code, § 19-2515.

SUMMARY OF ARGUMENT

1. The admission, in an Idaho murder prosecution, of evidence tending to show that petitioner had committed a different but related murder in the State of Washington, of which murder petitioner was acquitted in Washington, did not violate the Double Jeopardy Clause of the United States Constitution. The evidence was relevant. The Fifth Amendment does not bar even a second trial for the same conduct by a different, separate sovereign, even though the accused was acquitted in the first prosecution. The well-established dual-sovereignty doctrine precludes the theory that evidentiary use of other-crime evidence related to an offense of which the accused was acquitted violates federal constitutional guarantees. There is no conflict among lower courts relating to federal questions in this area of law.

2. There is no federal constitutional requirement that juries must participate in capital sentencing decisions. The Cruel and Unusual Punishment Clause speaks to different concerns. This Court has repeatedly upheld capital sentencing statutes which authorize judges, rather than juries, to make final decisions respecting the imposition of capital punishment.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I.

Petitioner's Conviction Was Not Based on Evidence Admitted in Violation of the United States Constitutional Provision Protecting the Accused from Being Placed Twice in Jeopardy.

Petitioner maintains that his acquittal in the State of Washington of the murder of a different victim, Scott Currier, brought into operation a federal constitutional bar to the use of evidence of the Washington offense in petitioner's Idaho prosecution for the murder of Kimberly Ann Palmer.

We begin with the observation that the crime described by the evidence, although a separate offense, was not "unrelated." Rather, the facts admitted relating to the Scott Currier murder in Washington were an inherent part of the continuing transaction resulting in the murder of Kimberly Palmer--i.e., a part of the "whole picture." The evidence tended to show that Currier was murdered in the State of Washington, in the presence of Kimberly Ann Palmer, and that Palmer was later killed to protect Paradis and his accomplices from the possibility that Palmer might become a witness against them. See, State v. Paradis, 676 P.2d 31 (Idaho 1983).

As a general rule in Idaho and other jurisdictions, otherwise competent evidence of other unrelated crimes by a defendant is not admissible to show that the defendant is guilty of the crime charged. It is thought that evidence of mere criminal disposition is unduly prejudicial and has the capacity to lead the jury to decide the case on emotion rather than evidence that logically creates an inference of guilt. On the other hand, the rule has been extensively and substantially qualified by the following universally adopted exceptions: evidence of other crimes is admissible, in

addition to other situations not relevant here, when such evidence tends to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) common design, plan, or scheme, and (5) identification of the accused as the person who committed the crime charged. 1 Wharton, Criminal Evidence, §§ 241, 243-249 (13th ed. 1972). These exceptions have been unequivocally recognized by the Supreme Court of Idaho. State v. Needs, 99 Idaho 883, 591 P.2d 130 (1979); State v. Shepherd, 94 Idaho 227, 486 P.2d 82 (1971).

Moreover, the rule that other-crime evidence is inadmissible simply does not apply where the other crime precedes, is contemporaneous with, or is a part of the crime charged, and the circumstances surrounding the other crime are necessary to prove or explain the criminal act charged. 1 Wharton, Criminal Evidence, § 242 (13th ed. 1972) (the "whole picture" rule). The Supreme Court of Idaho recognized this principle in State v. Izatt, 96 Idaho 667, 534 P.2d 1107 (1975), and gave the following rationale for its decision:

> The state is entitled to present a full and accurate account of the circumstances of the commission of the crime, and if such an account also implicates the defendant or defendants in the commission of other crimes for which they have not been charged, the evidence is nevertheless admissible. The jury is entitled to base its decision upon a full and accurate description of the events concerning the whole criminal act, regardless of whether such a description implicates a defendant in other criminal acts. 96 Idaho at 670, 534 P.2d at 1110.

The quoted language clearly underscores as well as approves the strong public interest in enforcement of the criminal law, including effective prosecution and jury deliberations. See, generally, Standefer v. United States, 477 U.S. 10 (1980), for a discussion of this interest in the context of a decision not to impose nonmutual collateral estoppel against the government in a criminal case.

Thus, the constitutional theory put forward here by the petitioner would have this Court reject the public interest in effective prosecution and having the whole picture reviewed by the trier of fact because the accused had been acquitted of the other crime prior to the relevant prosecution. Petitioner's contention ignores the substantial, probably majority, body of law supporting the proposition that otherwise competent evidence of another crime is not rendered inadmissible because the accused was acquitted of such crime. See, e.g., 1 Wharton, Criminal Evidence, § 262 (13th ed. 1972, and Supp. 1982 and cases cited therein); Annot., 86 A.L.R. 2d 1132 (1962, Later Case Service 1979, and Supp. 1982); Cleary, McCormick on Evidence, § 190 (2d ed. 1972); note, "Expanding Double Jeopardy: Collateral Estoppel in the Evidentiary Use of Prior Crimes in Which the Defendant Has Been Acquitted," 2 Fla.St.U.L.Rev. 511, 522-524 (1974).

Petitioner's position that the otherwise competent and relevant evidence relating to the murder of Scott Currier in Washington was unconstitutionally admitted in evidence is based on the contentions that: (1) admission violated the Fifth Amendment guarantee against double jeopardy (appellant cites Ashe v. Swenson, 397 U.S. 436 (1970) and Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972), in support of this contention); (2) admission was barred by the doctrine of collateral estoppel, which has been applied by this Court to the Fifth Amendment guarantee against double jeopardy (Ashe v. Swenson, supra, and Wingate v. Wainwright, supra); and (3) there are conflicts in the decisions of lower state and federal courts respecting the admissibility of evidence of other offenses of which the defendant has been acquitted.

Appellant's arguments, and his reliance on the previously-cited authority, are misplaced. Not only should

the previously-mentioned authority upholding the admissibility of evidence of other crimes despite acquittal be considered a constitutionally permissible application of rules of evidence, but this case differs fundamentally from appellant's authority.

The first and clearly determinative distinction between petitioner's authority and this case is that in every case cited by petitioner the same state or sovereign first prosecuted the accused (for the crime of which the accused was acquitted) and then reprosecuted the accused for the same conduct or introduced evidence of the prior crime in a subsequent prosecution for a different crime. In this case, petitioner was first prosecuted by the State of Washington for Scott Currier's murder and then prosecuted by the State of Idaho for Kimberly Palmer's murder. As set forth in the Opinion of the Supreme Court of Idaho, State v. Paradis, supra, the evidence of the crimes was so intertwined that part of the circumstantial evidence relating to Currier's murder was also related to, and necessary to explain, Palmer's murder. It was in the later prosecution in Idaho, not Washington, that the issue of admissibility of evidence relating to another crime arose. Consequently, there were different sovereign states involved in the relevant two prosecutions. This distinction renders inapplicable, indeed erroneous, the very reasoning upon which petitioner relies.

Clearly, the Fifth Amendment guarantee against double jeopardy does not bar a second trial for the same conduct by a different, separate sovereign, even though the accused was acquitted or convicted in the first prosecution. Bartkus v. Illinois, 359 U.S. 121 (1959); Abbate v. United States, 359 U.S. 187 (1959) (state prosecution followed by federal prosecution); United States v. Wheeler, 435 U.S. 313 (1978)

(Indian tribal court prosecution followed by federal prosecution); Pope v. Thone, 671 F.2d 298 (8th Cir. 1982) (federal prosecution followed by state prosecution); Perry v. United States, 514 F.Supp. 156, D.N.J. 1981 (federal prosecution followed by state prosecution); and State v. Russell, 229 Kansas 124, 622 P.2d 658 (1981) (successive prosecutions by two states). See, also, 1 Wharton, Criminal Law, § 17 at 126 (1972). Bartkus, supra, and Abbate, supra, as well as their progeny, rest on the basic structure of our federal system. The exercise of power of one sovereign should not usurp the right of another sovereign to exercise its power.

Successive prosecutions by separate sovereigns are sanctioned by the dual-sovereignty doctrine in recognition that "a single act may constitute separate and distinct offenses against two sovereigns, punishable by both." United States v. Brown, 604 F.2d 557 (8th Cir. 1979). Consequently, with reference to a paraphrased statement of the Fifth Amendment, the accused is not twice placed in jeopardy for the same offense. Two offenses are involved--one against each sovereign. Wheeler, supra, 435 U.S. at 317-318.

Ashe v. Swenson, supra, reduced to its simplest terms, represents a classic double jeopardy fact pattern where the same sovereign reprosecutes the accused for the same conduct after acquittal--in particular, relitigating the precluded issue of the accused's participation in the relevant robbery. The other case cited by appellant in support of the double jeopardy argument, Wingate v. Wainwright, supra, involved the same sovereign that had first prosecuted the accused for several robberies, subsequently using the evidence of the earlier robberies in a prosecution for a later unrelated robbery. The challenged testimony of the eye witnesses to the other robberies, of which the accused

had been acquitted, was offered to show course of conduct. The Court reasoned that such testimony placed the accused in the position of again being compelled to defend his innocence of the other robberies, and thus he was in effect twice placed in jeopardy for the same offense by the same sovereign. Clearly, these cases cited by petitioner do not reverse or put into question the dual-sovereignty doctrine. As separate sovereigns are involved in the case at hand, Idaho would not have been precluded by the Fifth Amendment from reprosecuting appellant for Scott Currier's murder after the Washington prosecution. Consequently, the Fifth Amendment does not bar the evidentiary use of the facts of Currier's murder, which arguendo, according to Wingate has the same impact as reprosecution for the same conduct. In other words, Ashe incorporated collateral estoppel into double jeopardy as an inherent ingredient, and not as an expansion of the constitutional guarantee. Note, Expanding Double Jeopardy: Collateral Estoppel in the Evidentiary Use of Prior Crimes of Which the Defendant Has Been Acquitted, 2 Fla.St.U.L.Rev. 511, 531, n.91 (1974).

The distinction that separate sovereigns were involved in this case is equally determinative of the issue whether collateral estoppel is applicable. Although some dispute exists over the wisdom of, and the prerequisites for, applying the collateral estoppel doctrine in criminal prosecutions, it is commonly accepted that, similar to the same sovereign requirement for the guarantee against double jeopardy, identity of parties, including the prosecuting governmental entity, is required. An acquittal in one criminal case operates as collateral estoppel in another criminal case only where the parties to both proceedings are identical. It is fundamental that the governmental entity against which estoppel is sought must have been a party to

the initial prosecution. The State of Idaho is not the same sovereign as the State of Washington, and thus is not barred by collateral estoppel. United States v. Smith, 446 F.2d 200 (4th Cir. 1971); Annot. 9 A.L.R. 3d 203, 215-218 (1966 and Supp. 1982); Restatement (2d) of Judgments, §§ 27, 28, 34 (1982); 1 Wharton, Criminal Law, § 72 (14th ed. 1978).

Although the stranger to the judgment of acquittal was the defendant rather than the prosecuting attorney in Standefer v. United States, supra, the decision of this Court not to impose collateral estoppel against the prosecuting governmental authority seems relevant to this inquiry. In Standefer, the conviction of an aider and abetter was affirmed despite the prior acquittal of the alleged perpetrator of the offense. Both prosecutions were by the same governmental entity. In refusing to give force to nonmutual collateral estoppel against the government, the Court distinguished a criminal case from the civil case which had approved nonmutual collateral estoppel, noting that in a criminal case the government is frequently without the "full and fair opportunity to litigate," which is the underlying assumption of estoppel. The Court listed as bases for this observation the special limits or prohibitions applicable to a criminal case concerning discovery, admission of evidence, judgment notwithstanding a verdict, new trial, and appellate review. It might also have listed the more difficult burden of proof imposed in criminal cases. In conclusion, the Court stated that "competing policy considerations" outweighed the policies undergirding the estoppel doctrine, quoting the following language from the Court of Appeals:

> "[T]he purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of

> the individual defendant. The public interest in the accuracy and justice of criminal results is greater than the concern for traditional economy professed in civil cases and we are thus inclined to reject, at least as a general matter, a rule that would spread the effect of an erroneous acquittal to all those who participated in a particular criminal transaction. To plead crowded dockets as an excuse for not trying criminal defendants is in our view neither in the best interest of the courts, nor the public. 447 U.S. at 25.

The emphasis and priority given the public interest in criminal cases appears equally pertinent to, and persuasive in, this proceeding.

The conclusion that collateral estoppel should not be applied where there is a lack of identity of the prosecuting authority necessarily involves the conclusion either that it is not unfair to the adverse party to allow the second prosecuting authority to proceed or that the unfairness of precluding the second authority is of greater concern than any unfairness to the adverse party. Preclusion in this case would be particularly unfair given the high probative value of the admitted evidence and the strong, legitimate interest in presenting the "whole picture" to the trier-of-fact. In effect, petitioner in his attempt to deprive the jury of the "whole picture" deviously seeks to avoid absolutely any accountability or prosecution for a murder in Idaho--an offense against the people of Idaho--based upon the prosecution brought by Washington for a different murder. Fairness does not mandate such a ridiculous result.

Even if it were assumed for the purpose of argument that the same sovereign was involved in both prosecutions, respondent contends that the normal standard for admissibility of evidence could constitutionally be applied. The question should be whether the probative value of the evidence outweighs its prejudicial impact. Acquittal should

not be an absolute bar to admission. Oliphant v. Koehler, 594 F.2d 547 (6th Cir. 1979); United States v. Castro-Castro, 464 F.2d 336 (9th Cir. 1972); Ladd v. State, 568 P.2d 960 (Alaska 1977); 1 Wharton, Criminal Evidence, § 262 (13th ed. 1972 and Supp. 1982 and cases cited therein); Annot. 86 A.L.R. 2d 1132 (1962, Later Case Service 1979 and Supp. 1982); Cleary, McCormick on Evidence, § 190 (2d ed. 1972).

The petitioner was appropriately afforded protection against any potential prejudice in this case by the court's jury instruction that evidence of other crimes was to be considered:

> [O]nly for the limited purpose of determining if it tends to show a motive for the commission of the crime charged and the existence of the intent which is a necessary element of the crime charged, and the identity of the person charged with the crime which is on trial. (Trial Tr. Vol. 5, p.677.)

The cases cited by petitioner do not address the dual-sovereignty aspect of this case, and respondent perceives no basis for the argument that there exists a conflict in the decisions of lower courts which should be resolved by this Court. Appellant also contends that there is a conflict among the decisions of lower courts because some states hold that other crime evidence impacts the admissibility of such evidence as that in the present case, while others hold that evidence of other crimes of which the accused is committed involves the weight of the evidence rather than its admissibility. The cases cited by the petitioner do not conflict in the interpretation of principles of law arising under the United States Constitution. These conflicts are conflicts related to matters of state law, or, in the federal courts, to issues different from that presented here. They do not present a proper federal question for the consideration of this Court.

II.

Whether a Capital Sentence Shall Be Imposed by a Judge or by a Jury is a Matter of Legislative Discretion and is Not Controlled by Rule of Constitutional Law.

Petitioner contends that there is a conflict among lower courts respecting the constitutionality of a sentencing scheme in capital cases that does not involve jury participation. He argues that the conflict should be resolved by this Court and presents the proposition as a reason for granting petition for certiorari. However, the case cited by petitioner, State v. Quinn, 623 P.2d (Or. 1981), was decided on state constitutionalgrounds and did not involve a conflicting interpretation of the United States Constitution.

In addition, petitioner contends that the trial is not terminated until the sentencing hearing has been held, wherefore the right to a "trial" by an impartial jury, guaranteed by the Sixth Amendment to the Constitution of the United States, requires jury participation in capital sentencing. He also contends that the jury is necessary "to maintain a link between contemporary community values and the penal system," Gregg v. Georgia, 428 U.S. 153, 190 (1976), a theory related to the Cruel and Unusual Punishment Clause.

The argument that somehow "evolving community values" must be reflected in capital sentencing confuses the basic question of whether the death penalty is, itself, cruel and unusual punishment with the totally unrelated question of whether there is some constitutional ground for the proposition that the death penalty can be imposed by none other than a jury. It is a novel argument that jury sentencing is constitutionally required in capital cases by the operation of the Cruel and Unusual Punishment Clause. The "evolving standards of decency" referent of those cases which stand

for the principle that the Cruel and Unusual Punishment Clause of the Eighth Amendment is to be applied by considering the extent to which public opinion has come to regard a particular kind or quality of punishment as abhorrent has nothing to do with who shall decide punishment. This Court has stated:

> [T]hat the Eighth Amendment has not been regarded as a static concept. As Mr. Chief Justice Warren said, in an oft-quoted phrase, '[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' Trop v. Dulles, supra, at 101 ... . Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment. ... Gregg v. Georgia, 428 U.S. at 173.

It is apparent that the Court, in considering whether a particular penalty does not comport with the "evolving standards of decency that mark the progress of a maturing society," has been in each case concerned with the quality of the penalty provided and not with the identity of the sentencing authority. See, for example, Gregg v. Georgia, supra (capital punishment); Trop v. Dulles, 356 U.S. 86 (1958) (denationalization); Robinson v. California, 370 U.S. 660 (1962) (imprisonment for status of being addicted to narcotics); Weems v. United States, 217 U.S. 349 (1910) (imprisonment in chains at hard and painful labor); Francis v. Resweber, 329 U.S. 459 (1947) (second attempt at electrocution).

The limitations on Cruel and Unusual Punishment Clause analysis reflected in the foregoing cases is a predictable result of the language of the clause, which is addressed to the appropriateness of particular penalties:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. U.S. Constitution Amendment VIII. (Emphasis added.)

Consistently, the Cruel and Unusual Punishment Clause has been relevant to the assessment of barbarous methods of

punishment and, as the clause has taken on new meaning with the advancement of social conscience, to methods and varieties of punishment that are offensive in light of contemporary values. Gregg, supra.

If petitioner were correct, one would expect the Cruel and Unusual Punishment Clause to read:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted, nor capital sentences inflicted without meaningful community participation.

The clause does not read that way, and to achieve the result petitioner seeks would require writing into it a new principle. Nothing in the history of the clause as it has been interpreted in this Court suggests that it has any relevance to this issue.

Nevertheless, the petitioner urges that the meaning of the clause must now be expanded to regulate a state legislature's choice of sentencing authority. In doing so, he ignores the following admonition of this Court that mirrors a basic principle of division of powers:

> [I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.
>
> This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." Furman v. Georgia, supra, at 383 (Burger, C.J., dissenting). Gregg v. Georgia, 428 U.S. at 175. (Emphasis added.)

In the final analysis, whether the death penalty is imposed by a judge or a jury has nothing to do with whether the penalty is cruel and unusual. Moreover, there is no empirical evidence that judicial sentencing is more likely

to result in arbitrary or capricious sentencing decisions than jury sentencing. Indeed, it has been suggested that the opposite is true:

> This Court has pointed out that jury sentencing in a capital case can perform an important societal function [citations omitted], but it has never suggested that jury sentencing is constitutionally required, and it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analagous cases. Proffit v. Florida, 428 U.S. 242, 252 (1976), reh. den. 429 U.S. 875. (Emphasis added.)

Although this Court has not directly considered the question of whether jury sentencing is a constitutional requirement, the Court's opinions contain unmistakable indications that no such mandate is a part of the Constitution. The above-quoted language from Proffit v. Florida, supra, is such an indication. In Dobbert v. Florida, 423 U.S. 282 (1977), reh. den. 434 U.S. 882, the Court reviewed a case in which the trial judge overruled the jury recommendation for a life sentence and sentenced the defendant to death, and upheld the Florida death penalty statute. Although the Court was concerned with whether the statute violated the ex post facto clause, it is significant that the Court found, in the process of determining that the statute was ameliorative and thus not violative of the ex post facto clause, that defendants sentenced under the new statute were not significantly disadvantaged because pursuant to it, "unlike the old statute, a jury determination of death is not binding. Under the new statute, defendants have a second chance for life with the trial judge and a third, if necessary, with the Florida Supreme Court." 432 U.S. 282 at 296. It seems unlikely to respondent that this Court, having once found a judicial sentencing statute constitutional because it was less onerous than a jury

sentencing statute, would now be prepared to hold that evolving standards of decency demand jury sentencing.

Petitioner suggests that Dobbert v. Florida, supra, differs substantially from the questions raised by the Idaho statute inasmuch as the jury had, at least, a chance to express an opinion about the penalty under the Florida sentencing scheme (meaningful community participation). While that may be true, the circumstance was that the trial judge utterly overruled the jury determination and substituted his own, as authorized by the Florida statute, and was upheld in doing so by this Court. The process was one which cancelled out the jury's participation and, for constitutional purposes, respondent is unable to fathom any distinction between no jury participation and jury participation which can be made to count for nothing. Although it is true that the Florida scheme authorizes the jury to express an opinion, which might be expected to have some effect on the judge, there is no existing authority for the proposition that the difference is a matter of constitutional importance.

The constitutionality of Florida's sentencing procedure has received extensive attention from the Florida Supreme Court as well as from this Court. See: Washington v. State, 362 So.2d 658 (Fla. 1977), cert. den. 441 U.S 937 (1979); Sawyer v. State, 313 So.2d 680 (Fla. 1975), cert. den. 428 U.S. 911 (1976), reh. den. 429 U.S. 873 (1976); Gardner v. State, 313 So.2d 675 (Fla. 1975), reversed on other grounds, 430 U.S. 379 (1977); Douglas v. State, 328 So.2d 18 (Fla. 1976); Dobbert v. Florida, supra; Barclay v. State, 343 So. 2d 1266 (Fla. 1977), reversed on other grounds 362 So. 2d 657, cert. den. 439 U.S 892 (1978); Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. den. 439 U.S 920.

One significant sign of this Court's disinclination to consider jury sentencing a constitutional mandate appears in Justice Rehnquist's opinion as a circuit justice in Richmond v. Arizona, 434 U.S. 1323 (1977), reh. den. 434 U.S. 976 (1977), in which he ruled that a criminal defendant had no constitutional right to have a jury find facts in aggravation or mitigation of punishment and remarked that "Such jury input would not appear to be required under this Court's decision in Proffit." 434 U.S. at 1325. Where the Court has overturned judicially imposed sentences, the decisions rested not on who the sentencing authority was, but on how the sentencing authority's discretion was exercised. Lockett v. Ohio, 438 U.S. 586 (1978); Bell v. Ohio, 438 U.S. 637 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982).

Appellant suggests that judges cannot adequately reflect community values in the capital sentencing process. Apart from the fact that this analysis, which proceeds from the Cruel and Unusual Punishment Clause cases, has no applicability to the question of who the sentencing authority shall be, its assumption is incorrect.

The contemporary values of the community are reflected in the capital sentencing statutes enacted by the elected representatives of the community, and to a greater extent than jury sentencing would make possible. In the capital sentencing process the judge is restricted almost entirely by those values. He may not impose the death penalty unless he does so upon an aggravating factor specifically identified by the state legislature. Gregg v. Georgia, supra, and the related line of cases speak entirely to the question of whether the selection of the death penalty, by a legislature, is consistent with contemporary standards of decency. None of those cases contains even the slightest suggestion

that the Cruel and Unusual Punishment Clause was meant to test judicial sentencing.

Moreover, the right of the defendant to present all relevant mitigating evidence insures that the death sentencing decision will be based on a full exposition of evidence about the character of the offender, and that, in itself, is considered to be a factor leading to death sentencing decisions on an individualized basis as required by contemporary values as they apply to the capital sentencing process.

It can hardly be gainsaid that the Constitution not only does not require that a jury of twelve persons, which has never been considered in the law to be a representative policy-making body, be allowed to make unguided decisions that the death penalty does or does not comport with "responsible public views," it does not permit such practice. Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, supra.

On the other hand, if the sentencing process is guided by statutory factors, as it is, it would appear that a judge rather than a jury is in a better position to insure that death sentences are uniformly imposed, free from factors of whimsy and arbitrariness. It seems to have been the impression of this Court that jurors' lack of experience in sentencing matters was one of the factors responsible for the capricious results that arose out of unguided discretion in sentences imposed by juries:

> Since the members of the jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given. ... To the extent that this problem is inherent in jury sentencing, it may not be totally correctable. It seems clear, however, that the problem will be alleviated if the jury is given guidance. ... Gregg v. Georgia, 428 U.S. at 192.

If that be the case, judicial sentencing more nearly addresses the Court's concern about arbitrary and capricious sentences than does jury sentencing.

Appellant lastly argues that Witherspoon v. Illinois, 391 U.S. 510 (1968), is authority for the proposition that the jury should be involved in capital sentencing decisions. Witherspoon was concerned with controls on those functions that juries are expected to perform. The case can hardly be thought of as authority for the different proposition that juries are constitutionally expected to make capital sentencing decisions.

CONCLUSION

The petition for a writ of certiorari should be denied.

DATED this_____day of May, 1984

Respectfully submitted,

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Attorney for Respondents

No. 83-6653

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DONALD M. PARADIS

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 17 day of May, 1984, served a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO, by placing same in the United States mail, first class postage prepaid, addressed to Mr. William V. Brown, P.O. Box 687, Coeur d'Alene, Idaho 83814, counsel of record for petitioner.

LYNN E. THOMAS
Solicitor General
State of Idaho

CERTIFICATE OF SERVICE

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-6611

THOMAS HENRY GIBSON, Petitioner,

vs.

STATE OF IDAHO, Respondent.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

The Petitioner, Thomas Henry Gibson, who is now held in an Idaho State penitentiary, asks leave to file the attached Petition for a Writ of Certiorari to the Supreme Court of the State of Idaho without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The petitioner's affidavit in support of this motion is attached hereto.

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